Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 519/2018

In the matter between:

ROAD ACCIDENT FUND — Defendant/Applicant

And

THELANI BAKKER N.O. — Respondent/Plaintiff

ZENOBIA BAKKER (DECEASED)

In re:

ZENOBIA BAKKER — Plaintiff

And

ROAD ACCIDENT FUND — Defendant

Coram: LEVER J

JUDGMENT

Lever J:

1. This is an application where unfortunately the Notice of Motion sets the tone for everything that follows. The relevant Notice of Motion reads:

   "1 Rescinding the order in terms of Rule 42 of the Uniform Rules of the Court Act (sic).
   2 That the Respondent be ordered to pay the cost of this application in the event she opposes same.
   3 Further and/or alternative relief."

2. What order the applicant seeks to rescind is not evident from the Notice of Motion. The founding affidavit was of some assistance in that regard. Before moving on to deal with what the application appears to be about, I must point out that the applicant had not filed Heads of Argument in accordance with the court practice directives. The respondent and the Court were only favoured with a copy of applicant's Heads of Argument this morning. Ms Mhlanga, who appeared for the applicant apologised and informed the court she had taken over from her colleague who had supplied her with the wrong date of the hearing. Even though Ms Mhlanga could have checked the Notice of Set Down or the court roll I accepted the applicants Heads of Argument under those circumstances.

3. What the applicant seeks can be partially gleaned from the founding affidavit, partially from the answering affidavit and partly from the decision in a similar

application in another division[1]. The application in the matter before me has been drafted in an imprecise and sloppy manner. This is a complete contrast to what was placed before Watt AJ in the matter of the Road Accident Fund v Pierre Goosen N.O.[2].

4. The common cause or undisputed facts gleaned from the papers in this matter show that: The matter proceeded to trial before my Brother Nxumalo J on the 24, 25, 26 and 27 October 2022; Prior to the matter proceeding to trial on the 24 October 2022, the parties settled the heads of damages relating to past loss of earnings and future loss of earnings; This settlement of past and future loss of earnings was reached by way of a written offer from the applicant dated 21 September 2022 which was accepted on behalf of the plaintiff by correspondence dated 11 October 2022; My Brother Nxumalo heard evidence on general damages and past medical expenses on the dates already mentioned and reserved his judgment; During argument and before judgment was reserved a draft order was handed up for consideration of the court in making its Order; As a formality and for the sake of completeness this draft order was couched in terms that included the terms of the settlement agreement relating to past and future loss of earnings; Subsequent to Nxumalo J reserving his

[1] The Road Accident Fund v Pierre Goosen N.O. case number 1121/2020, a decision of Watt AJ in the Eastern Cape Division, Gqeberha., handed down on the 18 February 2025. This judgment has not found its way to SAFLII and a copy of this judgment was handed to me by applicant's Counsel Ms Mhlanga together with the judgment in which leave to appeal was granted in that matter.

[2] Footnote 1 above.

judgment and prior to such judgment the applicant/defendant requested a signed discharge in respect of the past and future loss of earnings, this was requested and supplied on 22 November 2022; The applicant defendant requested certain documents on the 29 November 2022 in relation to the settled amounts, the requested documentation was supplied on the 19 January 2023; Respondent/plaintiff annexed a document produced by the applicant/defendant which showed that the settled portion of the claim was entered into the applicant's payment system with the date of acceptance being the date of the discharge letter, being 22 November 2022; The plaintiff passed away on the 20 March 2023 (the deceased or plaintiff as the context indicates); The amount agreed and due to the deceased in respect of the settled past and future loss of earnings was due to be paid 180 days after it was entered into the applicant/defendant's awaiting payment list, accordingly, the payment was due on 22 May 2023; Nxumalo J delivered his judgment and order on the 8 November 2023.

5. As is clear from the Notice of Motion dated the 4 March 2024, the applicant claims rescission of the judgment under the provisions of Rule 42 presumably of the Uniform Rules of Court. The relevant portion of the Notice of Motion is quoted above. The Order which the applicant/defendant seeks to rescind can only refer to the Order of Nxumalo J handed down on the 8 November 2023.

6. I need to make it quite clear before I consider the application for condonation or seek to analyse the case made out by the applicant. In both the Notice of Motion and the founding affidavit, the applicant only seeks rescission in terms of Rule 42 of the Uniform Rules of Court (the Rule or Rules depending upon the context). Although the term 'common law' is bandied about in the founding affidavit, it is not used in the context of rescission. No case is made out in the founding affidavit that would engage the common law grounds for rescission. Also, this is not a case as in the case of The Road Accident Fund v Goosen[3], where the applicant makes a case for an extension of the common law grounds of rescission in certain defined circumstances under the provisions of section 173 of the Constitution[4]. It is also not an application under section 39(2) of the said Constitution to extend the common law in accordance with the spirit and objects of the Bill of Rights.

7. The applicant/defendant has not even attempted to make out a case under the provisions of section 39(2) or 173 of the said Constitution. Nor has there been any attempt to engage the requirements of the said sections of the Constitution. Also, the applicant/defendant has not initiated this application in the manner contemplated in Rule 16A. Accordingly, the constitutional issues have not

[3] Above at footnote 1.
[4] Act 108 of 1996.

been made relevant to the present application nor have they been appropriately dealt with.

8. The first issue to be dealt with is the application for condonation for the delay in bringing the rescission application currently before me. The deponent to the founding affidavit states at paragraph 5.1 of the applicant's founding affidavit:

> "It is necessary at this stage for the Defendant (the applicant herein) to address the issue of the late filing of this application. The Order was granted on 8 November 2023 the Defendant had until the 6 December 2023 to bring this application."

9. Why the applicant/defendant needed to bring the application on or before the 6 December 2023 is not explained anywhere in the founding affidavit. I can only speculate as to why the applicant/defendant thought it needed to bring the application before the 6 December 2023. To speculate in these circumstances will not be helpful. An application for a rescission of judgment under the common law needs to be launched within a reasonable time. The same requirement applies to an application for a rescission under the provisions of Rule 42.

10. The reasonable time period is calculated from the time the person seeking rescission becomes aware of the need for rescission. In the present case where the applicant/defendant seeks rescission on the basis that the deceased is not entitled to future loss of earnings where she died long before the parties

expected her to die when they settled that particular head of damages. The reasonable period within which the application is to be launched would run from the date the applicant/defendant gained knowledge of the defendant's death. In this regard, the allegations made by the applicant/defendant are set out as follows in the founding affidavit:

> "5.2 The Defendant was advised, after receiving the order, that the Plaintiff had passed away on the 20 March 2023. The Defendant immediately directed correspondence to the Plaintiff's legal representative in respect of the Order. The Defendant requested that the court order be varied by agreement between the parties to take into account the death of the Plaintiff.
>
> 5.3 The Plaintiff's legal representatives responded to the request on the 7 February 2024 that they do not agree to variation by agreement.
>
> 5.4 The Defendant sought legal advice on the way forward in the light of the Plaintiff's/Respondent's refusal to vary. It became apparent that the Defendant will need to bring a substantial (sic) application for the rescission alternatively, the variation of the order. …"

11. As can be seen from the passages quoted above the deponent to the applicant/defendant's founding affidavit herein claims that the applicant/defendant only gained knowledge of the plaintiff's demise after the order was handed down on the 8 November 2023.

12. The respondent being the executor of the deceased's estate asserted that the applicant's claim that it only gained knowledge of the deceased's demise after the 8 November 2023 was not correct. The respondent annexed and referred to an email authored by the very deponent to the applicant/defendant's

founding affidavit herein. The said email is dated 5 April 2023. In this email the said deponent seeks copies of the Letters of Executorship and a Power of Attorney if the attorney is not the executor. The request is motivated on the basis that this would allow the applicant/defendant to make payment in the matter.

13. What this email shows is that the applicant/defendant was aware of the plaintiff's death at least from the 5 April 2023. Ms Mhlanga submitted that the applicant would only be officially aware of the death of the plaintiff when it was furnished with a death certificate. This argument is disingenuous and does Ms Mhlanga no credit. Letters of Executorship could only be issued on the Master being furnished with a death certificate. In any event the terms of the 5 April 2023 email show beyond any doubt that the said deponent was already aware of the plaintiff's death on the 5 April 2023. Clearly, the deponent's assertion that the applicant/defendant only gained knowledge of the demise of the plaintiff after the 8 November 2023 is false.

14. Mr Murray Van Heerden SC who appeared for the respondent stated that although it was his experience that RAF had access to the Department of Home Affairs database on a routine basis to confirm whether plaintiffs were alive or dead, he had no proof to substantiate his experience. This was pertinently and candidly confirmed by the RAF in the case provided by Ms

Mhlanga the matter of The Road Accident Fund v Goosen N.O.[5]. Clearly, on the facts it is established that the applicant/defendant had actual knowledge of the plaintiff's demise at least from the 5 April 2023.

15. What is further revealed, the Notice of Motion in the present matter being dated 4 March 2024, is that from the date the applicant/defendant had knowledge of the death of the plaintiff being the 5 April 2023, a period of approximately 11 months had passed up to the point where the present Notice of Motion was issued. The applicant/defendant makes no attempt to explain why it took 11 months to launch the present application.

16. In circumstances where the applicant is less than scrupulously accurate with the facts and where there is no attempt to explain the full period of the delay condonation will not be granted. Condonation is refused in this case.

17. This is enough to dismiss the application. However, I have heard argument on the respondent's point *in limine* and the merits and I address those issues in case I am wrong on my ruling in respect of the dismissal of the condonation application.

18. In respect of this point Mr Van Heerden submitted that the present application was only to rescind the Order of Nxumalo J handed down on the 8 November

[5] Footnote 1 above at para [9].

2023, but that could not be done without simultaneously seeking an order to set aside or vary the underlying settlement agreement on future loss of income.

19. In developing this argument Mr Van Heerden referred me to several authorities on the nature of and consequences of settling or compromising a legal dispute. The first is the decision of the Supreme Court of Appeal (SCA) in the matter of Road Accident Fund v Ngubane where the relevant passage reads as follows:

> "[12] Consistently with waiver the parties have, by entering into a compromise, terminated whatever rights and obligations they may have had including the Fund's right to demand compliance with reg 2(3). In other words the plaintiff is not entitled to recover full compensation for damages she has suffered and the Fund is precluded from raising any defence it had against the original claim. The agreement of compromise gave rise to new rights and obligations upon which the plaintiff rooted her cause of action. Unless reserved in the compromise, parties thereto are precluded from enforcing rights and obligations arising from the compromised claim."[6] (references excluded)

20. Mr Van Heerden then referred me to the decision of the Constitutional Court in the Matter of Mafisa v The Road Accident Fund, where the Constitutional Court stated:

> "[33] A compromise is an agreement between the parties to prevent or terminate a dispute by adjusting their differences by mutual consent. It is trite that a compromise gives rise to new contractual rights and obligations which exist independently of the original cause of action.

[6] Road Accident Fund v Ngubane 2008 (1) SA 432 at para [12].

Once a compromise is reached the parties are precluded from proceeding on the original cause of action (unless, of course, the compromise provides otherwise).

[34] Inherent in the concept of compromise is the risk, which is voluntarily assumed by both parties, that their bargain may be more or less advantageous than litigating the original cause of action. Lawfully struck compromises find support in our law as they do not only serve the interests of the litigants but may also serve the interests of the administration of justice. (references omitted)"[7]

21. A compromise has the effect of *res judicata* para [36] in Road Accident Fund v Taylor, the SCA states:

"[36] The essence of compromise (transactio) is the final settlement of disputed or uncertain rights or obligations by agreement. Save to the extent that the compromise provides otherwise, it extinguishes the disputed rights or obligations. The purpose of a compromise is to prevent or put an end to litigation. Our courts have for more than a century held that, irrespective of whether it is made an order of court, a compromise has the effect of *res iudicata* (a compromise is not itself *res iudicata* (literally 'a matter judged') but has that effect)."[8]

22. On the authority of Mafisa's case[9] a lawfully struck compromise is in the interests of justice. Also, on the authority of Mafisa's case[10] a compromise is a new cause of action independent of the original claim. The SCA in Taylor's case[11] held that in making a compromise an order of court, the court does not enquire into the merits of the matter nor is there an enquiry into whether the

[7] Mafisa v Road Accident Fund and Another (CCT 156/2022) [2024] ZACC 4 (25 April 2024). Also reported at 2024 BCLR 805 CC and 2024 (4) SA 426 (CC).
[8] Road Accident Fund v Taylor 2023 (5) SA 147 (SCA) at para [36].
[9] Footnote 7 above at para [34].
[10] Footnote 7 above at para [33].
[11] Footnote 8 above at para [51].

compromise is justified on the merits, the court also does not enquire if the compromise was validly concluded. The court merely considers if it is appropriate to incorporate the terms of the compromise into an order of court.

23.On the above facts and authorities Mr Van Heerden argued that the loss of earnings claim was settled on the 11 October 2022. That the matter became *res judicata* and the court *a quo* had no power to embark on an enquiry as to whether the compromise was justified on the merits or if the compromise was validly concluded. Mr Van Heerden contended that the compromise was finalised before the trial commenced. Mr Van Heerden further submitted that the fact that the settlement agreement was incorporated into the Order of Nxumalo J does not change the nature of the settlement agreement. The applicant/defendant did not answer these contentions. In fact, it is my belief, that they cannot answer these contentions.

24.Mr Van Heerden contended that it flowed from these authorities cited that the applicant/defendant cannot amend the compromise. In my view I do not have to go that far certainly on the case made out by the applicant/defendant there is no factual or legal basis set out to set aside the settlement agreement in this case. In my view there can be no rescission or variation of the court order unless the underlying settlement agreement is first set aside or varied. The applicant/defendant has not made out a case in fact or in law to vary or set aside the settlement agreement in this case. Accordingly, the applicant/defendant cannot succeed in its present application.

25. In case I am wrong in the above conclusion I will consider the further arguments raised by the applicant/defendant.

26. The applicant/defendant accepts that *litis contestatio* had been reached prior to the plaintiff's demise and that it followed that the plaintiff's estate was entitled to the benefit of the general damages.

27. It seems from paragraph 12.7 of the founding affidavit that the applicant/defendant wishes to rescind or vary the order made by Nxumalo J on the 8 November 2023 insofar as such order relates to the future loss of earnings and the undertaking in respect of future medical expenses. The undertaking in respect of future medical expenses can only be valid for the life of the plaintiff and automatically falls away on plaintiff's death. The undertaking for future medical expenses can thus not be an issue before this court and deserves no further attention.

28. The closest the applicant/defendant gets to motivating its case is set out in paragraph 11.7 of its founding affidavit, which reads as follows:

> "11.7 The legal position is clear; the common law does not entitle a dependant of a deceased person, or estate (through the executor) of a deceased person, to be paid for the deceased's claim for future loss of earnings and medical expenses. This is so because these claims

amount to prospective patrimonial damages that the Plaintiff will not incur due to their (sic) passing. …"

29. The applicant/defendant does not set out any legal basis for the sweeping statement set out in paragraph 11.7 of its founding affidavit. As can be seen the contractual settlement of the dispute between the parties constituted a new cause of action which obliterated the pre-existing cause of action. Without a basis in fact or in law to set aside the compromise agreement, the settlement agreement becomes an asset of the plaintiff on conclusion and on plaintiff's death an asset in the deceased's estate. If the settlement agreement had provided for the unexpected demise of the plaintiff and set up a mechanism for re-evaluating the future loss of earnings in such agreement, that would have been a different matter. The settlement agreement did not do so. No factual or legal basis has been set out by the applicant/defendant to set aside the settlement agreement. Consequently, the compromised claim has become an asset in the deceased's estate, including the agreed amount for future loss of earnings.

30. Without an agreed mechanism in the compromise agreement itself to allow for a re-calculation of future loss of income if the plaintiff does not live as long as assumed in reaching the compromised agreement, allowing a court to vary or set aside such agreement would not be in the public interest or in the

interests of the administration of justice. This is so because it offends two fundamental legal concepts that would apply in the circumstances. The first of these concepts is the *'once and for all rule'*, and the second is the rule that regards a compromise in litigation as tantamount to *res iudicata*. To undermine one or both concepts would reduce the motivation for litigants to compromise their respective positions in litigation. That would clearly be against the public interest and not be in the interests of the administration of justice. Accordingly, this court cannot assist the applicant/defendant under the catch all prayer for 'further and/or alternative relief'.

31. Although the applicant/defendant invoked Rule 42, it has not made any effort to bring its case within the parameters contemplated by Rule42(1)(a), (b) or (c). On this ground as well, the application cannot succeed.

32. In the applicant/defendant's replying affidavit and at paragraph 5.2 thereof, the deponent sets out the following:

> "5.2 Although the RAF Act must be interpreted as extensively as possible in favour of the third parties in order to afford them the widest possible protection, this does not mean that they are to be provided with a windfall or a largesse. It is simply to put them in the position they would have been but for the motor vehicle collision. Hence, this application for the reconsideration and/ varying of the order under review."(my emphasis)

33. To the extent that the underlined portion constitutes a new cause of action in reply which was not adequately foreshadowed in the founding affidavit, this is not permitted. In any event, no legal basis is set out in the founding affidavit or in reply to justify such relief.

34. Even though the applicant/defendant has not made out a case to develop the common law relating to rescission and variation of court orders, even if this were possible without setting aside or varying the underlying settlement agreement, under the provisions of section 39(2) of the Constitution, I think it is appropriate to repeat a warning given by the Constitutional Court in that context in the Carmichele case, where at paragraph [36] the Constitutional Court stated:

> "In exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary."[12]

35. In the context of section 173 of the Constitution and in the Siemens case[13] Fabricius J recognised that section 173 of the Constitution does not enable a court under the mantle of regulating its own process to impair the existing substantive rights of a litigant.

[12] Carmichele v Minister of Safety and Security 2001 (4) SA 936 (CC) at 954D-E.
[13] Siemens Telecommunications v Datagenics 2013 (1) SA 65 (GNP) at 72E.

36. The applicant/defendant has not made a case for amending the common law rules relating to varying or rescinding a court order which is made on the basis of an underlying settlement agreement. Even if a case for such relief were made out, great care would need to be exercised in doing so as it risks undermining the desirability and efficacy of settling litigation. A litigant who compromises their position would no longer have certainty on their position in law *vis a vie* the compromised or settled dispute.

37. Finally, in the Heads of Argument submitted on behalf of the applicant/defendant Ms Mhlanga requests that judgment in this matter be postponed pending the outcome of the full Bench appeal in the matter of the Road Accident Fund v Goosen N.O. In the absence of an agreement to do so, I can see no reason why I should postpone my judgment in this matter. For all of the reasons set out above, the application is dismissed.

38. This leaves the question of costs to be resolved. Mr Van Heerden motivated for costs in favour of the respondent/plaintiff on an attorney and client scale.

39. In my view an order of costs should follow the result. The applicant has been guilty of not presenting the facts in relation to condonation scrupulously accurately. The application itself is ill conceived and sloppily drafted and presented. The application itself was only issued long after the payment became due and the applicant/defendant had already had the benefit of the 180

day interdict period. The applicant/defendant did not pay out or even tender the undisputed amount as an interim payment. In these circumstances, I believe a punitive costs order is appropriate.

40.Mr Van Heerden handed up a draft order which dealt with costs. This draft order would be appropriate if the costs had been settled. However, in the absence of a settlement it would be inappropriate for me to make an order in those terms. Having regard to the issues involved and their complexity as well as the fact that Mr Van Heerden was involved in the initial trial, I think it appropriate that the costs of Senior Counsel be included in the said attorney and client costs.

41.Scales A, B and C are for party and party costs and are not applicable where the court orders attorney and client costs.

In the circumstances, the following order is made:

1. The application is dismissed.
2. The applicant/defendant is to pay the costs of the respondent on a scale as between attorney and client. Such costs are to include the costs of Senior Counsel.

[redacted]

L.G Lever
Judge
Northern Cape Division, Kimberley.

<u>Representation:</u>

For the Applicant:	*MS J MHLANGA*
Instructed by:	*OFFICE OF THE STATE ATTORNEYS*
For the Respondent:	*ADV MH VAN HEERDEN (SC)*
Instructed by:	*HAARHOFFS INC.*
Date of Hearing:	*08 August 2025*
Date of Judgment:	*15 August 2025*