



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2017/11257

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

DATE
SIGNATURE

In the application by

**MOTUPA, MMAPUTHI MARIA
AND
THE MINISTER OF POLICE**

APPLICANT

RESPONDENT

In re the matter between

**MOTUPA, MMAPUTHI MARIA
and
THE MINISTER OF POLICE
NATIONAL COMMISSIONER OF POLICE
STATION COMMISSIONER NORKEM PARK**

PLAINTIFF

FIRST DEFENDANT

SECOND DEFENDANT

THIRD DEFENDANT

JUDGMENT

MOORCROFT AJ:

Summary

Settlement – attorney briefed by a party has the authority to compromise claim – actual or ostensible authority – apparent authority not limited by instructions not known to other party

Agreement – may be entered into under circumstances where parties foresee that there might be outstanding issues to negotiate – parties may expressly or by implication leave outstanding issues to future negotiation while entering into a binding agreement

Order

[1] In this matter I make the following order:

1. *The respondent is ordered to pay the amount of R 4 918 244.00 to the applicant;*
2. *The respondent is ordered to pay interest on the above amount at the rate of 10.5% per annum from date of service of summons to date of payment;*
3. *The respondent is ordered to pay the cost of the action and the cost of the application;*

[2] The reasons for the order follow below.

Introduction

[3] The applicant as plaintiff claimed damages from the Minister as first defendant and respondent arising out of a shooting incident. She was shot by a member of the South African Police Service under circumstances where the member was mentally unfit and did not qualify to possess a firearm allocated to him by the Police Service. The

respondent conceded liability. (The second and third defendants are the National Police Commissioner and the Station Commander of the Norkem Park Police Station and it is not necessary to differentiate between the three defendants in the trial action as the first defendant as the responsible Minister is liable, *nomine officio*, for delicts committed by members of the Service acting within the course and scope of their duties or in circumstances such as the present.)

[4] The claim for medical expenses and the interest of 10.5% *per annum* payable on the claim became settled by 17 October 2022. The only outstanding issues then were the claim for past and future loss of income and general damages.

[5] The applicant now alleges that both these claims have been compromised and that the compromise offer was accepted by her. This compromise is denied by the respondent.

[6] On 31 October 2022 the State Attorneys in their capacity as the attorneys of record for the respondent, made a written offer to the applicant. The offer was summarised as follows:

23. I therefore, believe that a fair and reasonable offer for settlement would be as follows;

Past and future loss of income	R2 618 244.00.
Past and future medical expenses (As agreed)	R800 000.00.
General Damages	R1 000 000.00

[7] This offer was revised and increased in an email on 7 November 2022 – the amount of R2 618 244 was increased by R500 000 to R3 118 244.

[8] The offer was accepted on 10 November 2022. The applicant's attorneys wrote as follows to the respondent's attorneys on 10 November 2023:

Dear Sir,

We refer to your email dated 7 November 2022.

After discussing the matter with our client, our client has advised us that she accepts your counter proposal which we hereby do.

In this regard we highlight the agreed damage quantum:

1. Loss of Income (past and future)	R 3 118 244.00
2. Medical expenses R 800 00.00	
3. General damages 1 000 000.00	R
Total	
R 4 918 244.00	

Therefore the terms of the Settlement is as follows, by way of summary.

- 1 Payment in the sum of R 4 918 244.00 (to be made by the Defendants jointly and severally the one pay the other be absolved).
- 2 Interest on the above damage amount at a rate of 10.5% per annum, calculated from date of service of Summons until date of full and final payment;
- 3 Taxed or agreed cost, on a party to party scale (inclusive of cost of senior counsel);
- 4 Full and final settlement.

Kindly confirm that the above is in order, and in the interim we will prepare the necessary Settlement Agreement for signatures.

[9] The question for decision now is whether this correspondence constitutes a settlement of the outstanding issues.

[10] The respondent raises three defences and these will be dealt with under separate headings below. These defences are that there exist factual disputes that preclude a decision on application, that the settlement agreement was conditional and subject to further full and final instructions, and the lack of authority of the State Attorney to conclude a settlement agreement.

Factual disputes

[11] The allegation of factual disputes is a bald statement and no actual factual disputes are identified on the papers. I conclude upon a reading of the affidavits and particularly the documents relied upon as constituting the settlement agreement that there are no factual disputes arising from the papers.

[12] The factual disputes that are referred to, relate in the main to matters that preceded the making of the offer and they relate to the expert reports.

The absence of full and final instructions, and the authority of the State Attorney to reach a compromise

[13] The State Attorney acting for the respondent, Mr Mpulo, settled the merits, the medical expenses portion of the damages claim and the interest rate in October 2022. On 17 October 2022, the parties agreed that the two outstanding issues on the *quantum* namely past and future loss of income and general damages should be settled through negotiation.

[14] Mr Mpulo admits that he received instructions from the respondent to send the letters of October and November 2022. The letters are unconditional and not open to the interpretation that these are mere proposals for discussion subject to full and final instructions. The applicant accepted the offers.

[15] The applicant argues in addition that even if it were accepted that Mr Mpulo did not have actual authority, then he certainly had ostensible authority. He was the State Attorney acting for the respondent. The respondent by appointing the State Attorney, represented that Mr Mpulo had authority to act for and to bind the respondent.

[16] In *Hlobo v Multilateral Motor Vehicle Accident Fund*¹ Plewman JA said² that the Courts encourage parties to deal with their disputes by attempting to reach a

¹ *Hlobo v Multilateral Motor Vehicle Accident Fund* 2001 (2) SA 59 (SCA).

² Para 10.

compromise³ and the practice is well-established.⁴ A compromise disposes of the proceedings.⁵ The conduct of a party's case at the trial of an action is under the control of the party's counsel and counsel has authority to compromise the action.⁶ The apparent authority of counsel cannot be limited by instructions unknown to the other party.⁷ The attorney of record stands in the same position as counsel.⁸

[17] In *Minister of Police v Van der Watt and Another*⁹ Kubushi J (speaking for the Full Court of the Gauteng Division of the High Court in Pretoria) concluded¹⁰ that -

"....by merely appointing the State Attorney to represent the appellant in resisting the first respondent's claim, the appellant represented to the first respondent and to the world at large, that the State Attorney had the necessary authority to settle the claim. There was no information conveyed to the first respondent's legal representatives that the settlement reached was against the express instructions of the appellant and for that reason they must reasonably have believed that the State Attorney and counsel had the requisite authority to settle the claim. The appellant is accordingly bound to the settlement agreement on the basis of the State Attorney's apparent authority."¹¹

³ Or, a *transactio*.

⁴ See Rule 37(6)(c) that compel litigants to discuss settlement at pretrial conferences, and now also Rule 41A that encourages voluntary mediation.

⁵ See also *Estate Erasmus v Church* 1927 TPD 20 at 23.

⁶ *R v Matonsi* 1958 (2) SA 450 (A) 456A - H and *Benjamin v Gurewitz* 1973 (1) SA 418 (A) 428E - F.

⁷ Plewman JA referred to *Halsbury's Law of England* 4th ed vol 37 para 511. This *obiter* statement by Plewman JA was endorsed in *MEC for Economic Affairs, Environment and Tourism v Kruizenga* [2010] ZASCA 58.

⁸ *Waugh and Others v H B Clifford & Sons Ltd and Others* [1982] 1 All ER 1095 (CA) and *Alexander v Klitzke* 1917 EDL 408.

⁹ *Minister of Police v Van der Watt and Another* [2021] ZAGPPHC 53 paras 45, 49, 55 and 58.

¹⁰ Para 50.

¹¹ The learned Judge referred in footnote 10 to *MEC for Health and Social Development of the Gauteng Provincial Government v Mathebula and Others* [2016] ZAGPJHC 187 para 30.

[18] I find that the State Attorney made an offer to the applicant's attorneys on 31 October and 7 November 2022 in respect of the outstanding issues, namely the loss of earnings claim and the general damages claim.

Did the applicant make a counter-offer?

[19] The question then is whether the offer was accepted as is stated in the second line of the applicant's attorneys' letter of 10 November 2022, or whether the letter constitutes a counter-offer.

[20] On 11 November 2022 the applicant's attorney wrote to the respondent's attorney, as follows:

Dear Sir,

With reference to the above-mentioned matter and settlement reached.

We would request the settlement agreement for your client's signature, kindly note that our client has already signed same.

We trust you find the above in order.

[21] The draft written settlement agreement sets out the exact same terms of the settlement, as follows:

2. The damage quantum is calculated as follows namely:

2.1	Loss of Income (past and future)	R 3 118 244.00
2.2	Medical expenses (past and future)	R 800 000.00
2.3	General Damages	R 1 000 000.00
	Total:	R 4 918 244.00

[22] The document provides for certain aspects not agreed on in the correspondence, namely -

- 22.1 costs on a party and party scale, inclusive of the cost of senior counsel;
- 22.2 the agreement to be made an order of court, and
- 22.3 the draft document confirms that the offer is in full and final settlement of all claims.

[23] Neither counsel dealt expressly with the question whether the applicant's letters of 10 and 11 November 2022 constituted a counter-offer. It was argued on behalf of the respondent that there was no offer to be accepted, and therefore no counter-offer, while the applicant did not regard the proposed written settlement agreement of 11 November 2022 as a counter-offer. I therefore invited both parties to file further heads of argument on this question and they both did so.

[24] Where parties negotiating an agreement reach agreement by way of offer and acceptance the fact that there are still a number of other outstanding issues material to the contractual relationship upon which the parties have not yet agreed may indeed prevent the agreement from having contractual force. This would be the case where the parties contemplated that consensus on the outstanding issues would have to be reached before a binding contract could come into existence. However, the existence of outstanding issues do not necessarily deprive an agreement of contractual force when the parties intend to conclude a binding agreement while agreeing either expressly or by implication to leave the outstanding issues to future negotiation. Should more terms

be agreed subsequently the second contract would supersede the first; should more terms not be agreed the first contract stands on its own.¹²

[25] In the present matter the parties were involved in litigation in the court and at some stage the costs aspect would have to be either argued or settled.

[26] Settlement agreements in litigation are often reduced to writing, signed and made an order of court but doing so is not a prerequisite for enforceability when the agreement is valid and enforceable in itself.

[27] The making and acceptance of the offer in the correspondence referred to dealt with all the outstanding issues in the litigation and written agreement to the effect that the agreement was in full and final settlement of all claims would merely have confirmed this fact. There is nothing on the papers to suggest that the parties did foresee more litigation arising from the tragic incident and any subsequent claim could no doubt have been met with the defence that the claim was compromised in 2022.

[28] Under these circumstances I conclude that the settlement reached had full contractual force irrespective of whether the parties agreed on costs of senior counsel, making the agreement an order of court, and confirming that it was an agreement in full and final settlement of all claims. They were at liberty to enter into a further or more detailed agreement but did not have to do so.

[29] The settlement is therefore enforceable and the applicant is entitled the relief it seeks. The costs should follow the result but I do not believe that the punitive cost order argued for by the applicant is justified.

[30] For the reasons set out above I make the order in paragraph 1.

¹² *Cgee Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) 92C. See also *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* 2013 (2) SA 133 (SCA) para 12

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **21 AUGUST 2023**.

COUNSEL FOR THE APPLICANT:	JW KLOEK
INSTRUCTED BY:	MINNIE & DU PREEZ INC
COUNSEL FOR THE RESPONDENT:	L TYATYA
INSTRUCTED BY:	STATE ATTORNEY
DATE OF ARGUMENT:	24 JULY 2023, additional heads filed 11 AUGUST 2023
DATE OF JUDGMENT:	21 AUGUST 2023