REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number: 3/99

In the matter between:

LYNETTE NONQABA HLOBO
Appellant

and

THE MULTILATERAL MOTOR VEHICLE ACCIDENTS FUND
Respondent

CORAM: **MARAIS, PLEWMAN JJA and MPATI AJA**

HEARD: **16 NOVEMBER 2000**

DELIVERED: **28 NOVEMBER 2000**

Litigation - Action settled by agreement between attorneys - Defendant contending that authority given to its attorney was given in error - Application to set aside settlement.

JUDGMENT

PLEWMAN JA:

[1] On 13 November 1994 appellant's minor daughter T., then aged one year and seven months, was seriously injured in a motor collision which occurred on the old Berlin road in the Eastern Cape. The respondent, the Multilateral Accident Fund became obliged to meet a claim for compensation made on T.'s behalf. The claim was settled between the parties in circumstances more fully explained hereafter. The appeal, which is brought with the leave of the court *a quo*, concerns an application by respondent to set aside the settlement agreement.

[2] Appellant issued summons to recover the compensation due to T. in July 1996. Respondent entered an appearance to defend but the only matter in dispute was the *quantum* of the claim. The litigation proceeded in accordance with the normal sequence of pleadings and pre-trial procedures and the trial was in due course set down (initially) for 4 March 1997. Following a postponement it was again set down for trial on 20 August 1997. Two days before the hearing the action was settled by an agreement concluded between appellant's attorney, a Mr B A Lowe of the firm of Lowe and Petersen, and Mr D H De la Harpe of the firm Netteltons, respondent's attorney.

[3] The settlement covered all the matters in dispute such as general damages and a claim for future loss of earnings and, what is important in so far as the application to set it aside is concerned, it provided that respondent would (i) pay the cost of T.'s future medical expenses after a deduction for contingencies in the sum of R2 148 807.60 and (ii) in addition, respondent was to furnish an undertaking in terms of Article 43 of the applicable statutory provision in respect of certain agreed items of future expense.

[4] On 7 September respondent instituted proceedings by way of motion seeking an order, in its main claim, setting aside the provisions of the settlement agreement relating to the payment of the sum of R2 148 807.60 or, in an alternative claim, the settlement agreement as a whole. The basis of this application was respondent's contention that it was its intention, in settling the matter, to furnish an undertaking in terms of Article 43(a) to cover the cost of future medical expenses. The meaning and effect of such an undertaking need not be discussed here. It is obvious that respondent wishes to avoid having to lay out the cash sum above referred to.

[5] The court *a quo* (Kondile AJ) set the settlement agreement aside on three grounds. The first ground is the finding that a Mr V Short - a claims-handler in respondent's employ - lacked "contractual capacity" to conclude such an agreement. The second was that the settlement agreement was vitiated by reason of an error on Mr Short's part. The third was that the Fund is effectively the State, that the State was prejudiced by the obligation to make a cash payment rather than merely providing an undertaking in terms of Article 43 and that "persons in the position of (Respondent) and T. should be entitled to rescission of a contract and appropriate restitution or relief should they suffer prejudice because of the misconceived actions of their managers". It is necessary to deal with each of these grounds but before doing so the events leading to the settlement and the

manner in which it was concluded must be described in greater detail.

[6] On 18 August 1997 the litigation had been in train for more than a year. Since at least mid-February the parties' attorneys had, in an exchange of correspondence, been in negotiations concerning a settlement either of certain claims or of the claim as a whole. It seems from the record that this process was initiated by Mr De la Harpe in a letter dated 20 February (though it makes little difference how the process commenced). The attorneys also met each other from time to time to discuss settlement. One such meeting took place on 24 February. The record also establishes that comprehensive reports in relation to the negotiations were submitted to respondent by Mr De la Harpe. One such report was made on 25 February. In it Mr De la Harpe reported on his discussion with Mr Lowe regarding "the appropriate manner of settlement" including the settlement of "future medicals". In this report the possibility of giving "a certificate" (that is an Article 43 undertaking to cover all "future medicals") as opposed to "making use of the capitalisation" (that is discounting a cash payment) of certain items and the provision of a certificate for other items "where there is some prospect that (they) will not be incurred", is suggested. The latter option reflects precisely the form the settlement agreement ultimately took. The discussions proceeded to the point where the form of the agreement was accepted in principle by both Mr Lowe and Mr De la Harpe. These proposals were reported to respondent in detail and a draft of a Rule 37 minute which incorporated (as paragraph 1.3 - "claim for minor's future medical expenses") a statement "This claim has been settled on the basis that (a) (Respondent) will pay (Appellant) the sum of R2 148 807.60 (being R2 387 564 less a 10% contingency); and (b) (Respondent) will furnish (Appellant) with an undertaking for the minor child T.H. (as contemplated in Article 43 of the Agreement which is a Schedule to the Road Accident Fund Act No 56 of 1996) in respect of the items listed in Annexure A

hereto".

[7] On 17 July 1997 respondent (the letter being signed "V Short For Chief Executive Officer") wrote to Mr De la Harpe stating in relation to the proposals regarding the claim for future medical expenses "We advise that the contingencies should be further negotiated but are willing to accept a 10% contingency deduction in respect of the ticked items. As regards the Article 43 undertaking we accept your proposals with the exclusion of items 60, 61 and 98". In this letter authority was also given to De la Harpe to settle other aspects of the claim dealt with in the settlement agreement which are not now questioned. Armed with this confirmation Mr De la Harpe concluded the settlement. What the deponent to the founding affidavit said of this is "Although it is recognised that agreement was reached by attorney De la Harpe with attorneys acting on behalf of (Appellant), it was done on the strength of a communication from Mr Short who had no power to authorise such a settlement. The result of such settlement, if enforced would be to inflict gross prejudice upon (Respondent) in consequence of the error of the said Short".

[8] Against that background I return to the reasoning advanced by the court *a quo* for setting aside the settlement. As to the first ground (the suggested lack of contractual capacity): the inferences to be drawn from the exchange of correspondence and the terms of Short's letter of 17 July do not suggest that the settlement was concluded on the strength of Mr Short's independent initiative. The limits of his authority to settle claims independently (shown to have been limited after 10 July to R150 000) would not seem to have any bearing on the matter. The court *a quo's* conclusion that Short did not have the "capacity to contract" in relation to this particular settlement would therefore seem to be at least questionable. But quite apart from this it was, of course, of no significance. The settlement agreement was not concluded between Short and Lowe. It was

concluded between Lowe and De la Harpe and on the evidence De la Harpe had been authorised to conclude such an agreement. The debate concerning Mr Short's power to conclude settlements is misplaced. The case concerns only Mr De la Harpe's position. It is therefore unnecessary to examine this ground further. The court's conclusion cannot be supported.

[9] I turn then to the second ground. This raises the question of whether Mr Short's error (accepting for this purpose that it was an error) entitled respondent to set the settlement aside. The court *a quo's* reasoning here is to be found in passages which read "(Short) could not in my view have gathered the necessary experience to handle third party claims with any degree of reasonable skill"; that "the country was undergoing a transition which probably affected the functioning of State controlled bodies including (respondent); and that "on a conspectus of the case the (appellant's) attorney knew or ought to have known at the time of the agreement in issue that Mr Short was probably labouring under a misapprehension that the future medical items costing in excess of two million rand did not lend themselves to being disposed of by way of an undertaking in terms of Article 43 ......". The court *a quo* then concluded that appellant's attorney "was in the premises not blameless in the creation of this misapprehension in the mind of Mr Short. For these reasons the (respondent's) error in my judgment is *justus*". Respondent's counsel was not able (as indeed he could not be) to support these propositions. None of them are adverted to in the evidence. Mr Short deposed to a supporting affidavit on respondent's behalf in which he makes no mention of being brought under a misapprehension by Mr Lowe or indeed of having met or had any dealings with Mr Lowe or even - apart from obviously knowing that appellant was represented - of being aware of Mr Lowe's existence. Mr Short, it should be added, was a qualified attorney with a fair amount of practical experience. But, in any event, he did not suggest that he had insufficient

experience, nor did anyone else. Finally, there is no case made out that transitional difficulties were encountered.

[10] The proper approach to the question in my view should have been as follows. A compromise (or transactio) arrived at between litigants is a well established measure. Our courts encourage parties to deal with their disputes in this way and the rules decree that compromises must be sought. When concluded such a compromise disposes of the proceedings. *Estate Erasmus v Church* 1927 TPD 20 at p 23. What is more, in this country (as in England) the conduct of a party's case at the trial of an action is in the entire control of the party's counsel. Counsel has authority to compromise the action or any matter in it unless he has received instructions to the contrary. In England his apparent authority to compromise cannot be limited by instructions unknown to the other party. *Halsbury*, 4th Ed, Vol 37, para 511. Counsel's general authority in South Africa is similar. *R v Matonsi* 1958 (2) SA 450 (A) per Schreiner JA at p 456 A-H and *Benjamin v Surewitz* 1973 (1) SA 418 (A) at 423 E. At the stages prior to the assumption of control by counsel the attorney of record stands in the same position. As far as the position in English Law is concerned an instructive decision on the point is the case of *Waugh and Others v H B Clifford & Sons Ltd and Others* [1982] 1 All ER 1095 (CA). In this country the case of *Alexander v Klitzke* 1918 EDL 87 provides an example of the extent of an attorney's authority. (It is true that at that time powers of attorney had to be filed but the authority to carry the case "to a final end and determination" must necessarily still be the authority required when an attorney accepts instructions).

[11] What all this shows is that in his dealings with Mr De la Harpe Mr Lowe would have had no reason to question his (De la Harpe's) authority. He in fact did not do so. From Mr Lowe's point of view De la Harpe had at least ostensible

authority to conclude the settlement. All the requirements which must be satisfied before reliance upon ostensible authority can succeed were satisfied. Respondent had appointed Mr De la Harpe as its attorney. It was known to it that he was conducting settlement negotiations on its behalf. It allowed him to do so and in so doing clothed him with apparent authority to settle on its behalf. The appellant, through her attorney, relied upon the apparent existence of authority and compromised the claim on the strength of its existence. Absent any other defence, the settlement is binding upon the respondent. In fact of course he had express authority which it is now sought to repudiate.

[12] Respondent's case was that Mr Short made an error. This gives rise to the question of whether a mistake, such as that asserted by it, can entitle a party to repudiate its apparent assent to the settlement. The case of *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 at p 471 A-D, shows that the proper approach to this question is to take into account the fact that there is another party involved and to consider his position. As Fagan CJ said at p 471 B, "They (that is our courts) have, in effect said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man to believe he was binding himself." If the question is so posed in the present case it is clear that respondent cannot resile from the settlement. An exception noted in the authorities (upon which the court *a quo* seems to have focussed its attention), namely, that a party in the position of the respondent will not be bound if "his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party" does not arise in this case. The court *a quo's* finding in this regard is without foundation. There is nothing in the evidence to support it, nor is there anything to suggest that, although no misrepresentation was made by appellant or on her behalf, she or Mr Lowe appreciated that the respondent through its functionaries was under any misapprehension. There is no basis for holding that

Mr Short's (alleged) error was *justus*.

[13] It is enough in this matter to refer to the decision in this Court in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 A. The following passage from the judgment of Schreiner JA would seem to be in point:

> "......(A)lthough the Board of the respondent had to approve of contracts before they were made, a resolution by the Board that an offer was to be accepted could not, in a case like the present, bring a contract into existence. That could only happen when the acceptance was communicated to the other party, and it is not in dispute that the proper person to communicate the acceptance was the manager, Mr. Rust. He could not make contracts on his own, nor in this case did he profess to do so. But he was nevertheless the proper person to bring the respondent into contractual relationship with other persons.
>
> If the respondent had been a natural person who had accepted a tender according to its terms, there is no doubt that a contract would have been made when the acceptance was communicated to the tenderer, as by posting it. It would not be possible for such a natural person, if he repudiated, to escape liability by proving that he had posted the wrong letter or the like. That follows from the generally objective approach to the creation of contracts which our law follows. (See *van Ryn Wine and Spirit Co. v. Chandos Bar,* 1928 T.P.D. 417 at pp. 424, 425; *Irvin and Johnson (S.A.) Ltd. v. Kaplan,* 1940 C.P.D. 647 at pp. 650, 651; and the cases therein cited.) No other approach would be consistent with fairness or practicality. 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."

In the present matter Mr Short was the "Claims-Handler" to whom the file relating to the claim (for a sum in excess of R4 million) was handed and he was the person deputed to deal with respondent's attorneys in relation to all aspects of the claim. He was therefore the "proper person" to instruct respondent's attorneys. It is suggested in the judgment of the court *a quo* that this case is distinguishable but I am unable to see why this is so. In my view the principle affirmed in the *Potato Board* case applied equally to the facts of this case. The court's second ground can therefore also not be supported. I hold that the respondent is bound by the settlement concluded on its behalf.

[14] It is unnecessary to deal with the third ground in any great detail and I propose to do so only briefly. I have quoted above the court *a quo's* formulation of the principle it purported to apply. While it is not precisely clear to me what the court's reasoning is in counsel's heads of argument respondent's contentions go back, ultimately to the principle enunciated in *Collector of Customs v Cape Control Railways (Ltd*) 6 SC 402. That case concerned the abandonment of duty on a consignment of cement which was agreed to by the Premier of the Colony as representing the Government. The *ratio* of the decision was that the duty was legally payable and that the permission of the Premier afforded no justification for disobedience of the law requiring payment of duty. It is difficult to see how this principle can apply in the present case. It was both lawful and within the competence of the respondent to conclude a settlement in the circumstances which

prevailed and in the terms in which it did. Even if respondent could be equated to the state (which I question) no principle of law exists which can release it from the consequences of contracts lawfully concluded by it. The third ground too can therefore not be supported.

[15] In the result the appeal must succeed. The order I make is:

1. The appeal is upheld. The order of the court below is set aside save for that portion thereof which obliged respondent to pay the costs.

   There is substituted therefor an order that the application is dismissed with costs including the costs of two counsel.

2. The respondent is ordered to pay the cost of the appeal which costs are to include the costs of two counsel.

PLEWMAN JA

CONCUR:

MARAIS JA)
MPATI AJA)