**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**
Case No: 432/2016

In the matter between:

**ELMARIE SLABBERT** **APPELLANT**

**and**

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH AND SOCIAL DEVELOPMENT OF GAUTENG PROVINCIAL GOVERNMENT** **RESPONDENT**

**Neutral citation:** *Slabbert v MEC for Health and Social Development, Gauteng* (432/2016) [2016] ZASCA 157 (3 October 2016)

**Coram:** Mpati AP, Petse, Willis, Dambuza JJA and Potterill AJA

**Heard:** 19 September 2016

**Delivered:** 3 October 2016

**Summary**: Civil procedure – Compromise agreement made an order of court – Grounds for rescinding compromise are only fraud or *justus error* provided the mistake (error) vitiated true consent and did not merely relate to motive or to the merits of the dispute – Or mistake common to the parties – Court has no discretion to set aside consent order if underlying compromise is not set aside – Compromise agreement and consent order not rescinded.

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**ORDER**

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J, sitting as court of first instance).

1. The appeal is upheld with costs including the costs of two counsel.

2. The order of the court a quo is set aside and substituted with the following order:

'The application for rescission of the order made on 4 May 2015 is dismissed with costs, including the costs of two counsel.'

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**JUDGMENT**

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**Potterill AJA (Mpati AP, Petse, Willis and Dambuza JJA concurring):**

[1] This is an expedited appeal against an order of the Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J) wherein rescission and the setting aside of a consent order was granted. The court also *mero motu* ordered a rescission and the setting aside of the underlying compromise agreement. The crux of the matter is whether the rescission and setting aside of the order and agreement are appealable and were competent in terms of Uniform rule 42 and the common law. The appeal necessarily lies against both the rescission of the court order and the setting aside of the compromise agreement. The appeal is with leave of the court a quo.

[2] It is necessary to set out the facts leading up to the conclusion of the compromise agreement and it being made an order of court. The appellant (plaintiff in the court a quo), Ms Elmarie Slabbert (Slabbert) in her personal and representative capacity, issued summons, for payment of damages arising from injuries sustained

before, during and after her son's birth on 10 May 2003. In the particulars of claim it was averred that the medical staff of the Edenvale and Johannesburg General Hospitals, employed by the respondent (defendant in the court a quo), the Member of the Executive Council for Health and Social Development of the Gauteng provincial government (MEC), acted negligently resulting in her minor son suffering global hypoxic ischemic epileptic encephalopathy and brain damage. This, in turn, resulted in her son suffering the insult, dystonic athetoid quadriplegic cerebral palsy with microcephaly and convulsions.

[3] After the close of pleadings and pursuant to a pre-trial conference on 7 July 2014, the parties agreed to separate the merits from the quantum. A further pre-trial conference was held on 21 April 2015 and subsequent thereto the MEC's counsel furnished the respondent with a memorandum on the issue of liability. Counsel for the MEC thereafter received a written instruction from the MEC to settle the issue of liability. On 28 April 2015 the MEC's counsel approached Slabbert's counsel and offered the following compromise: liability is compromised with the MEC undertaking to pay 90 per cent of Slabbert's proved or agreed damages in Slabbert's personal and representative capacities. The MEC's offer of compromise was accepted by Slabbert's attorney. The MEC also consented to the costs of Slabbert's four expert witnesses and costs of senior and junior counsel. In the rescission application, the MEC chose not to set out any facts or the basis on which they offered to compromise. Slabbert had, at the time of the application for rescission, called on the MEC to provide the memorandum motivating why liability should be conceded, but the MEC refused to do so, relying on privilege. On 4 May 2015, counsel for Slabbert and the MEC attended court where the separation of quantum and merits and the offer of compromise were made orders of court.

[4] A pre-trial conference on the issue of quantum was held on 21 May 2015 with the pre-trial minute reflecting that that was the only issue left for determination. The MEC's attorney requested Professor Smuts, a Paediatric Neurologist, to provide the MEC with a medico-legal opinion and report for purposes of quantum. A further pre-trial conference pertaining to quantum was held on 30 March 2016 with the trial scheduled

to proceed on 18 April 2016. On 13 April 2016, the MEC terminated the mandate of the State Attorney and her counsel. The record is silent on the reasons for this. The MEC then appointed the current attorney and counsel.

[5] On the morning on which the trial relating to quantum was to commence, the MEC delivered an application seeking to rescind the two court orders. The one court order to be rescinded is not relevant to this appeal, but the other was for rescission of the court order in terms of which the compromise agreement was made an order of court.

[6] In the application for rescission the MEC relied on the report of Prof Smuts which was alleged to contain new evidence that had not been available to her prior to the conclusion of the compromise agreement. This report also disclosed that Prof Smuts had treated the minor child. Prof Smuts disclosed to Slabbert that the staff at the hospitals did not cause the child's condition. She had not disclosed this opinion to the MEC. Slabbert had also not disclosed the report of her expert, Dr van Rensburg dated 29 Ocotber 2010 (first report). This report reflected a different opinion on the basal ganglia to that contained in the expert summary, a discrepancy that required clarification through cross-examination.

[7] An agreement of compromise creates new rights and obligations as a substantive contract that exists independently from the original cause.[1] The purpose of a compromise is twofold: (a) to bring an end to existing litigation and (b) to prevent or avoid litigation.[2] When a compromise is embodied in an order of court the order brings finality to the *lis* between the parties and it becomes *res judicata*.[3] The court order changes the terms of a settlement agreement to an enforceable court order – through

[1] *Road Accident Fund v Ngubane* [2007] ZASCA 114; 2008 (1) SA 432 (SCA) para 12.
[2] *Vena v Port Elizabeth Divisional Council* 1933 EDL 75 at 87.
[3] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd & others* 1978 (1) SA 914 (A) at 922C.

execution or contempt proceedings.[4] Thus, litigation after the consent order will relate to non-compliance with the consent order and not the underlying dispute.

[8] This being said, a *transactio* (compromise) is made by consent between parties and like any contract or order of court made by consent, it may be set aside on the ground that it was fraudulently obtained. It may also be set aside on the ground of *justus* error, 'provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.'[5] A compromise agreement may also be set aside if the parties to the agreement laboured under a common mistake.[6] However, a unilateral mistake on the part of one party that does not flow from a misrepresentation by the other does not allow for the former party to resile from a consent agreement.[7] The question thus is whether one of these grounds exists for the MEC to resile from the compromise agreement.

[9] The court a quo accepted that there was new evidence that only came to light after the compromise agreement had been concluded. But for the following reasons, this factual finding is incorrect. It is common cause that prior to the compromise agreement Slabbert had served and filed four expert notices and summaries; the MEC had filed none. Slabbert's trial bundle with all the records from which these experts compiled their reports was in the possession of the MEC, since it was at a hospital under her supervision, prior to the compromise agreement being concluded. It is unsettling that the deponent to the founding affidavit can aver that there was new evidence proffered by Prof Smuts that the child suffered intrauterine retardation. This fact was pertinently raised in the expert summaries of Dr Langenegger, a gynaecologist and obstetrician; Dr Johan Smith, a neonatologist; and Dr van Rensburg, a neuro-radiologist. It is similarly untrue that the MEC was unaware of the fact that the umbilical cord was tied twice around the child's neck. This was set out in the particulars of claim and in the expert report of Prof Viljoen. It is also unfounded that the MEC was unaware

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[4] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) para 31.
[5] *Gollach* (above) at 922H-923A.
[6] *Tshivhase Royal Council & another v Tshivhase & another* [1992] ZASCA 185; 1992 (4) SA 852 (A) at 863.
[7] *Botha v Road Accident Fund* [2016] ZASCA 97 para 9.

that the child was born microcephaly because it is set out in Dr van Rensburg's expert summary. The summary notes that the involvement of the white matter of the intrapartum suggested the presence of a prolonged hypoxic injury at an early gestational age, probably around the beginning of the third trimester, and therefore before birth and before labour. He, nevertheless, persisted that despite this the condition of the child was due to a hypoxic insult at full term when a prior priming injury was present. Similarly, Dr Langenegger expressly recorded that at 34 weeks gestation, the intrauterine growth retardation was due to antenatal (prior to birth) neurological damage. Despite this, he was of the opinion that as a result of the failures by medical staff of the MEC, the foetus was exposed to partial prolonged hypoxia and acidosis. This evidence is not new, it is merely evidence which the MEC or her representatives did not consider properly.

[10] The court a quo was required to apply the *Plascon-Evans* rule[8] in accepting the version of Slabbert in so far as there was any dispute of fact pertaining to the reduced foetal movements towards the end of the pregnancy. Prof Smuts, in her report, recorded reduced foetal movements towards the end of the pregnancy. She was not in possession of any of Slabbert's experts' summaries when she compiled her report. There was no reference to reduced foetal movements towards the end of the pregnancy in the records or in the summaries. Prof Smuts did not disclose from where she derived this information because she did not obtain it first-hand. The reason for this was that she did not attend to Slabbert during her pregnancy. In answer to Prof Smuts' averment, Slabbert stated under oath that this statement by Prof Smuts is factually incorrect as she detected no decrease in foetal movements towards the end of the pregnancy. In applying the *Plascon-Evans* rule, the version of Slabbert was to be accepted and the court a quo incorrectly found that there was new evidence of reduced foetal movements towards the end of the pregnancy.

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[8]*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D; *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma & another v National Director of Public Prosecutions & others* [2008] ZACC 13; 2009 (1) SA 1; 2008 (2) SACR 421 (CC) para 8-10; *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (1) SACR 361 (SCA) para 26.

[11] In any event, Prof Smuts was at all material times in the joint employ of the University of Pretoria and the MEC at the Pretoria Hospital (now the Steve Biko Academic Hospital). When she treated the child, it was in her capacity as a clinician at the hospital and her records were at all relevant times under the control of and available to the MEC. The new argument raised by counsel for the MEC that only the records of Edenvale and Johannesburg hospitals were obtained as being relevant to the cause of action and that the MEC was unaware of the records at the Pretoria Hospital is factually incorrect. Slabbert discovered the records of Prof Smuts at the Pretoria Hospital prior to the compromise agreement being concluded. Even if Slabbert had not discovered these records, the MEC cannot rely on ignorance of its own records which are under her control, merely because they were at another hospital.

[12] During the course of argument, the highwater mark for the MEC was the non-disclosure by Slabbert of the first report by Dr van Rensburg prior to conclusion of the compromise agreement. This non-disclosure rendered the opinion of Dr van Rensburg pertaining to the basal ganglia and the timing of the brain injury suspect. In his supplementary affidavit he explained that when he compiled the first report he assumed that the minor child was born premature as he was not given details of the course of Slabbert's pregnancy or the child's birth. He recorded that the basal ganglia show normal volumes on the assumption that the child was born prematurely. Dr Lautenbach then almost immediately phoned him and informed him that the child was a full term baby delivered by C-section, that there were signs of foetal distress and that after birth he required resuscitation. Dr van Rensburg then reviewed his magnetic resonance imaging (MRI) films and concluded that the basal ganglia appeared shrunken and smaller than expected for a child born full term. He accordingly removed the first report from the file and his database. In February 2015 he was again contacted by Dr Lautenbach who informed him that there was evidence that the child had suffered from hypoglycaemia after birth. He then reviewed the MRI films and noticed that the pulvinar on both sides showed distinct signal increase which is an abnormality associated with neonatal hypoglycaemia. He included this in his report. This third report was what his expert summary was based on.

[13] The irony is that Prof Smuts attached the first report to her affidavit; it was thus in the possession of the MEC, leaving no room for fault to be attributed to Slabbert. But, there was no duty on Slabbert to disclose this report; it was no longer in the possession of Dr van Rensburg and Slabbert did not rely on it. She simply did not rely on it because the opinion came from an incorrect premise. The explanation proffered for the difference in the first report and the expert summary pertaining to the basal ganglia is undisputed. The court a quo erred in not accepting this undisputed version.

[14] There was also no duty on Slabbert to disclose to the MEC that Prof Smuts had expressed an opinion contrary to that expressed by the expert witnesses engaged by her. It was the MEC's duty to investigate the claim and obtain its own expert opinions. Yet no experts were consulted before the MEC made the offer of compromise pertaining to the merits. The MEC was in possession of all the relevant clinical records for the merits in respect of which the involvement of Prof Smuts had been disclosed. This fact is obvious because Prof Smuts was thereafter approached by the MEC's representatives for her historical records and reports for purposes of quantum. The MEC and her representative's duty of care must be exercised from the outset. That they did not consult Prof Smuts pertaining to merits, but only for purposes of quantum, is indicative of the fact that they did not exercise care in defending the claim, or the representatives of the MEC made a mistake. If proper attention had been given to the matter the 'new evidence' would have been seen for what it really was – evidence that had been available – prior to the conclusion of the compromise agreement. This 'new' evidence was also thoroughly dealt with by Slabbert's experts in coming to their conclusions.

[15] The compromise agreement thus cannot be set aside on the basis of a mutual error as there was no mutual error. The MEC cannot rely on her own mistake to avoid a

contract which was in any event initiated by her.[9] This unilateral mistake accordingly did not amount to a *justus* error. As stated by Christie:[10]

'However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract that is, failing to do his homework'. (Footnote omitted.)

[16] The court a quo was correct that a court cannot ignore facts placed before it, but these facts must sustain one of the established grounds on which a compromise agreement can be rescinded. Although a High Court has inherent discretion, it can never exercise it against recognised principles of substantive law. Our constitutional dispensation does not afford courts a carte blanche to ignore substantive law and grant orders couched as being in the 'interests of justice'. Moreover, certainty and finality are key elements of justice. Parties to a compromise agreement accept an element of risk that their bargain might not be as advantageous to them as litigation might have been. This element of risk is inherent in the very concept of compromise. It, however, does not afford parties the right to go back on the bargain for unilateral mistakes. Settlement agreements have as their underlying foundation the benefit of orderly and effective administration of justice. Courts cannot allow for consent orders to be set aside for reasons not sanctioned by applicable legal principles.

[17] A court also does not have a discretion to set aside a consent order where there are no grounds for setting aside the underlying agreement of compromise pursuant to which the consent order was made. In *Botha* this court found as follows (para 13):

'In *Theron NO v United Democratic Front (Western Cape Region) & others* 1984 (2) SA 532 (C) at 536G this court held that a court has a discretion whether or not to grant an application for

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[9] *Botha* (above) para 11; and *Patcor Quarries CC v Issroff and others* 1998 (4) SA 1069 SECLD at 1085A-E.

[10] R H Christie & G B Bradfield *Christie's the Law of Contract in South Africa* 6 ed (2011) at 329-330. See also these authorities therein cited *Wiggins v Colonial Government* (1899) 16 SC 425 at 429; *Acacia Mines Ltd v Boshoff* 1957 (1) SA 93 (T) at 101H-102B; *Diedericks v Minister of Lands* 1964 (1) SA 49 (N) at 57D-H; *Springvale Ltd v Edwards* 1969 (1) SA 464 (RA) 468 at 470H; *Osman v Standard Bank National Credit Corpn Ltd* 1985 (2) SA 378 (C) at 388F-I.

rescission under rule 42(1). But where, as here, the court's order recorded the terms of a valid settlement agreement, there is no room for it to do so.' (Footnote omitted.)

[18] On behalf of the MEC it was argued that the orders granting rescission were not appealable. The issue of the appealability of the order, irrespective of leave being granted by the court a quo, is a preliminary issue in any appeal, but in the light of the context of this matter and my conclusion, it can conveniently be dealt with at this late stage.

[19] The rescission orders in form appear to be interlocutory and prima facie not of final effect. On closer examination, the rescission of the compromise agreement is, however, final in substance and effect. To determine whether an interim order is appealable regard must be had to the effect of the order rather than its mere appellation or form.[11] In the words of Harms AJA in *Zweni v The Minister of Law and Order* 1993 (1) SA 523 (A) at 531J-532A:

'The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between parties and, as such, will decisively contribute to its final solution.'

The question of the appealability of an order where proceedings have not been finally determined was discussed in *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA) where Nugent JA said the following (paras 50-51):

'There will be few orders that significantly affect the rights of parties concerned that will not be susceptible to correction by a court of appeal. In *Liberty Life Assosciation of Africa Ltd v Niselow* (in another court), which was cited with approval by this court in *Beinash v Wixley* 1997 (3) SA 721 (SCA), I observed that, when the question arises whether an order is appealable, what is most often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. I said that two competing principles come into play when the question is asked. On the one hand justice would seem to require that every decision of a lower court should be capable not only of being corrected but of being corrected forthwith and before it has consequences, while

[11] *South African Motor Industry Employer's Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H.

on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice.

. . . I pointed out in *Liberty Life* [*Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC)] that while the classification of the order might at one time have been considered to be determinative of whether it was susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction, between orders that are appealable and those that are not, to one of principle.'

[20] In this matter the rescission orders will stand unless upset on appeal. As these orders were wrongly granted, they should be corrected forthwith and before the orders have consequences. The court a quo cannot change the consequences of the orders because the compromise agreement and consent order would have been laid to rest by the rescission orders. If the orders are not set aside, the consequences will, in effect, be to send the parties to ventilate an issue that has been lawfully settled by compromise in a costly, protracted trial. 'A compromise once *lawfully* struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits'.[12] Accordingly, the rescission of the consent order must be set aside because the court a quo did not have a discretion to set it aside in circumstances where there was no justification in law to set aside the compromise agreement. It would, thus, in these circumstances be appropriate to adjudicate the appeal as the order being appealed against has final effect.

[21] The following order is made:

1. The appeal is upheld with costs including the costs of two counsel.

2. The order of the court a quo is set aside and substituted with the following order:

'The application for rescission of the order made on 4 May 2015 is dismissed with costs, including the costs of two counsel.'

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[12] *PL v YL* 2013 (6) SA 28 (ECG) (also reported *Ex parte: PJLG & another; In re PJLG* [2013] 4 All SA 41 (ECG)) para 34 citing Ulric Huber *Jurisprudence of My Time* 3.15.15. (Sir Percival Gane translation), quoted with approval in *Eke* (above) para 22. (My emphasis.)

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S Potterill
Acting Judge of Appeal

APPEARANCES:

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| For the Appellant: | N G D Maritz SC (with him M M Lingerfelder) |
| Instructed by: | Joseph's Inc, Johannesburg |
| | McIntyre & van der Post, Bloemfontein |
| For the Respondent: | V Notshe SC (with him N Manaka) |
| Instructed by: | Diale Mogashoa Attorneys, Pretoria |
| | Honey Attorneys, Bloemfontein |