



**IN THE REGIONAL CIVIL COURT FOR THE REGION OF  
KWAZULU-NATAL  
HELD AT DURBAN**

Case no:KZN/DBN/RC

5628/12

In the matter between:

**RENWOOD CARRIERS CC**

1st Applicant

**MXOLISI GWAGWASHE**

2nd Applicant

and

**SHILO TRUCK & TRAILER REPAIRS CC**

Respondent

1st

**SHERIFF INANDA (AREA 1)**

Respondent

2nd

**Judgment delivered: 31 AUGUST 2022**

**Introduction**

[1] This is an opposed application in terms of which the Applicants seeks that the order granted on 18 May 2021 be varied by the deletion thereof in its entirety and by the substitution thereof as prayed in the Notice of Motion<sup>1</sup>.

<sup>1</sup> Index to Variation Application, pages 1 - 2.

[2] This is a subrogated claim as the Applicants and the Respondents are covered for claims of this nature. As such, the respective insurers are litigating against each other in the name of the insureds.

### **The Factual Background**

[3] Judgment on liability was granted before Regional Magistrate S Maphumulo on 8 July 2020. The trial in respect of quantum was set down for hearing on 18 May 2021 in terms of which a Settlement Agreement was made an order of court in terms of Rule 27(6) of the Magistrates Rules.

[4] The Applicants seeks that the existing order be substituted with the following order:

*'Judgment is hereby granted on the issue of quantum, by consent, in favour of the plaintiff against the defendants, jointly and severally, the one paying, the other to be absolved, for:*

- 1. Payment of the amount of R300,000.00;*
- 2. Interest thereon at the rate of 15.5% from date of summons to date of payment in full;*
- 3. Costs of suit, such costs to include the fair and reasonable expert fee for the plaintiff's expert witness, Aldo Botha.*

[5] A number of submissions were made by the parties in the papers and also during argument. In light of the conclusion to which I will come I do not deem it necessary to deal with each of the points raised *ad seriatim*, and will for the purposes of this judgment, focus on the salient submissions made by the parties.

## **Principle submissions on behalf of the Applicants**

[6] The Applicants aver that they intended to take the Magistrate's decision handed down on 21 September 2020 on appeal, pursuant to judgment on the merits having being granted 100% in favour of the Plaintiff. According to the Applicants it was decided that they would concede quantum to enable them to take the matter on appeal. Correspondence was sent to their Correspondent Attorneys to this effect and confirmed with Ms Nassiha Raof (hereinafter referred to as Ms Raof), on the day of the quantum trial. It is the Applicant's contention that they were unaware that Ms Raof was concluding a Settlement Agreement in terms of Rule 27(6) as she was only instructed to concede quantum.

[7] It was contended that the order made in terms of Rule 27(6) was made in error due to a *bona fide* miscommunication.<sup>2</sup> In this regard it was submitted that the conclusion of the Settlement Agreement was as a result of a mistake on the part of Ms Raof and as such, the order of 18 May 2021, stands to be varied, alternatively set aside on the basis of the common law ground of *justus error*.<sup>3</sup>

[8] It was further submitted that '*[t]he statement of the legal basis of the application by Megaw in paragraph 4<sup>4</sup> of the founding affidavit constitutes, for all intents and purposes, a concession of law.*'<sup>5</sup> In this regard, it was argued that the court is not bound by what Ms Megaw said in the founding affidavit pertaining to application being brought in terms of Rule 49(8) as it may grant the relief sought or

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<sup>2</sup> Index to Variation Application, Founding Affidavit, para 16, page 8.

<sup>3</sup> Applicant's supplementary concise heads of argument, para 7.

<sup>4</sup> Index to Variation Application, Founding Affidavit, para 4, page 6 '*This application is being brought in terms of 49(8) in order to request that the settlement be declared void and that the order that quantum be conceded and that judgment be entered for the Plaintiff.*'

<sup>5</sup> Applicant's supplementary concise heads of argument, para 8.

similar relief, if it is of the view that the facts justify the granting of the said relief on common law grounds of *justus error*.<sup>6</sup>

### **Principle submissions on behalf of the Respondent**

[9] It was submitted on behalf of the First Respondent (hereinafter referred to as the Respondent for the sake of convenience) that the record of proceedings of 18 May 2021, reflecting the court times confirms the submissions made by the Applicants in the founding affidavit attested to by Aimee Louise Megaw (hereinafter referred to as Ms Megaw).<sup>7</sup> It was argued that regard is to be had to the ancillary issues recorded in the Settlement Agreement detailing the payment of the quantum in instalment; that interest would be paid on a specific date as well as an agreement to pay the expert costs.<sup>8</sup> This, it was argued, is suggestive that Ms Raof had acted on express instructions. In addition, it was mooted that Ms Raof at no stage indicated that she had no instructions to conclude a Settle Agreement and as such, the Applicants cannot escape the fact that they consented to the terms of the judgment.

[10] The Respondent argued that a concession to quantum makes an appeal unavailable to the Applicants. In augmentation of this submission, reference was made to the matter of ***Kunene and Others v Minister of Police***<sup>9</sup>, where it was held that any appeal is unavailable to the Applicants unless their case is one of

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<sup>6</sup> Applicant's supplementary concise heads of argument, paras 8 – 9; See also *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC).

<sup>7</sup> Index to Variation Application, Founding Affidavit, para 13, page 7 '*Calls were made between myself and Ms Raof with respect to interest and same was discussed to finalize a draft order to finalize the matter (sic) Under the impression that ancillary issues would be finalized to that a draft order would be taken. Whereby the Plaintiff had proved its quantum and as such a final judgment had been taken and the matter was ripe to be taken on appeal.*'

<sup>8</sup> Index to Variation Application, Settlement Agreement, pages 61 – 62.

<sup>9</sup> (260/2020) [2021] ZASCA 76 (10 June 2021).

fraud, just cause or any other cause.<sup>10</sup> It was furthermore contended that the Supreme Court of Appeal rejected the argument tendered by the Applicants in similar circumstances in the case of ***Hlabo v Multilateral Motor Vehicle Accidents Fund***<sup>11</sup>. Reference was also made to the matter of ***Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others***<sup>12</sup>, where the SCA held that in determining whether a consent order may be rescinded, the correct starting point is the order itself rather than the underlying settlement agreement.

[11] It was argued that if regard is to be had to the Ms Megaw's affidavit, the order was taken by consent and as such the Applicant's cannot apply for appeal. The Respondent furthermore argued that it was an engaged process, which begs the question as to how *justus error* is able to set aside the underlying agreement. In addition, it was highlighted that the proposed draft order does not encapsulate all the terms agreed upon as the Applicants approached the court for a variation and not rescission application.

## Issues for determination

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<sup>10</sup> Index to Variation Application, Respondent's Heads of Argument, para 18.

<sup>11</sup> 2001 (2) SA 59 (SCA) at para 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.*'

<sup>12</sup> [2017] ZASCA 54; 2017 (5) SA 508

[12] The question which falls to be decided is whether the miscommunication between the Applicant's legal representatives is sufficient to justify a variation of an order.

### Legal Principles

[13] It is trite that once a court has made a consent judgment, it is *functus officio* and the matter becomes *res judicata*. The bases upon which judgments can be set aside at common law were summarised as follows in ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)***<sup>13</sup>:-

*'The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment (Firestone SA (Pty) Ltd v Genticuro AG1977 (4) SA 298 (A) at 306F - G). That is the function of a Court of appeal. There are exceptions.*

*After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, justus error. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. There are also, thirdly, exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order.'*

[14] The court may in terms of Section 36, rescind or vary granted which was obtain by mistake common to the parties.<sup>14</sup> According to the Jones and Buckle,

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<sup>13</sup> 2003 (6) SA 1 (SCA) at par [4].

<sup>14</sup> '(1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu* —

(a) ...

(b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties...'

'A common mistake would cover the case of a judgment entered by consent where the parties consented in *justus error*. It is, however, not sufficient if the mistake is that of —

- (a) one of the parties only; in other words, if a litigant by mistake of himself or his legal advisers abandons relief to which he is or may be entitled, the court has no jurisdiction or power to recall or amend the order it has in consequence deliberately made, in the absence of fraud of the other party in the course of the proceedings. The court refused to set aside a consent judgment upon the defendant's allegation that, although he had been assisted by his solicitor, he did not understand what he was doing;
- (b) the court; the general rule is that if the court has given judgment on mistaken facts, the judgment can be set aside only if the error was due to fraudulent misrepresentation, but if the court is in error because of innocent misrepresentation, the vanquished party is not entitled to have the judgment rescinded even if the error was *justus*, except in certain rare and exceptional cases;
- (c) a legal representative; if a legal representative consents to judgment under the mistaken belief that his client had authorized him to do so, the client is entitled to have the judgment rescinded, for any judgment by consent may, generally speaking, be set aside upon any ground which will invalidate an agreement between the parties.<sup>15</sup>

[15] It is trite that an order made in terms of Rule 27(6) is in effect an order by consent and is binding on the parties. It is also settled law that a settlement, whether extra-judicial or embodied in an order of court, is a *transactio* which has the same effect as *res judicata*.

### ***Justus Error***

[16] According to the *justus error* approach a party to an agreement who raises mistake and wishes to escape contractual liability must prove not only that the mistake is material but also that it is reasonable.<sup>16</sup> It is also a fundamental legal

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<sup>15</sup> Jones and Buckle Magistrates Court Act Commentary.

<sup>16</sup> *National and Overseas Distributors Corporation Ltd v Potato Board* 1958 (2) SA 473 AD where Shreiner JA said at 479H: "At least the mistake (error) would have to be reasonable"; Kerr A J 'The Principles of the Law of Contract' 6<sup>th</sup> Edition (LexisNexis), page 243 'Discussing the *iustus error* approach GF Lubbe and CM Murray cite

principle that a *transactio* may be set aside on the ground that it was fraudulently obtained or on the ground of mistake where the error is *justus*.<sup>17</sup> In the matter of ***Gollach & Gomperts v Universal Mills Produce Co***<sup>18</sup>, it was held that a reasonable mistake on the part of either party could be used as a valid ground for variation or rescission.

## Discussion

[17] The law reports are replete with a myriad of cases dealing with *justus error*.<sup>19</sup> It is apparent that this error *in casu* is not the type of error envisaged in Section 36 read with Rule 49(8) as it is not a mistake common to the parties. The effect of the relief being sought by the Applicants essentially amounts to them being excused from the agreement entered into on their behalf by Ms Raof as a consequence of what was referred to as a miscommunication or misunderstanding between Ms Raof and those instructing her. In terms of ***Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others*** (*supra*), a non-fraudulent misrepresentation is not a ground for rescission of judgment, however, in ***Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others***<sup>20</sup> it was stated that:

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*Van Rensburg, Lotz and Van Rhijn who in their description of this approach say that "before a person is allowed to claim nullity of a contract on the ground of mistake, he must show that he was labouring under a mistake which was both operative and reasonable (iustus)". The learned authors ...go on to say that on this approach "The party seeking to resile from the transaction (the resiler) will succeed in doing so only if, in addition to proving dissensus, he discharges the onus of showing that his mistake was reasonable and excusable under the circumstances...Should he succeed in establishing dissensus but fail on the second point the resiler will be liable ex contractu on objective grounds on account of his injustus error."*

<sup>17</sup> Jones and Buckle "The Civil Practice of the Magistrates' Courts in South Africa" Rule 27 (6).

<sup>18</sup> 1978 (1) SA 914 (AD) at 922C-H.

<sup>19</sup> *O'Neill v O'Neill* 1910 WLD 186; *De Vos v Calitz and De Villiers* 1916 CPD 465; *N v N* (2283/2021) [2022] ZAECMKHC 14 (17 May 2022) at para 22; *Ntlabezo and Others v MEC for Education, Culture and Sport, Eastern Cape, and Others* 2001 (2) SA 1073 (TKH) at 1078I-J; 1080B-D.

<sup>20</sup> 1978 (1) SA 914 (A).



*'...Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent judgement. I am not aware of any reason why justus error should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiates 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.'*

[18] The reasonableness of the mistake is an important consideration. In this regard, it is the Applicants contention that Ms Raof was instructed to concede the First Respondent's quantum and to allow judgment to be granted in favour of the First Respondent on the issue of quantum in order to allow the Applicants to bring an appeal against the findings made in respect of the issue of liability. The effect of the settlement agreement being made an order of court in terms of Rule 27(6) precludes the Applicants from being able to institute appeal proceedings in respect of the findings on the issue of liability.

[19] The Applicants seek to correct the mistake by asking that the court to replace the Settlement Agreement with orders sought in the notice of motion. The question to be answered is whether the agreement that was concluded, based on the factual matrix was granted as a result of *justus error*. In applying the considerations set out in ***Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others*** (*supra*), regard is to be had to the order itself. It is evident that there are terms contained in the Settlement Agreement that are not being transposed in the variation orders sought. This does not accord with the submission contained in the Founding Affidavit of Ms Megaw that she laboured under the impression *'that ancillary issues would be finalized so that a draft order*

would be taken.<sup>21</sup> It is further manifest that the Settlement Agreement was very detailed which is suggestive of an engaged process. This does not in and of itself exclude the possibility that a miscommunication or misunderstanding between Ms Megaw and Ms Raooof was not possible.

[20] The Applicants, in my view, would have had difficulty in prosecuting an appeal on a consent order regardless of whether the agreement contained reference to Rule 27(6) as the granting of an order making a Settlement Agreement an order of court is not appealable in terms of Section 83 of the Magistrates Court Act<sup>22</sup>. The principles governing the making of an agreement of settlement an order of court were restated by the Constitutional Court in *Eke v Parsons*<sup>23</sup>. One of the salient points of the judgment was that when the parties resolve the dispute that is before the court, the court may then (after satisfying itself that the settlement agreement is a permissible one) make the settlement agreement an order of court. The court, pointing out that not everything agreed to by parties should be accepted by courts, stated that:

*'The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place "relate directly or indirectly to an issue or lis between the parties". Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court...Secondly, "the agreement must not be objectionable, that is, its terms must be capable, both from a legal and practical point of view, of being included in a court order". That means, its terms must accord with both the Constitution and the law. Also, they must not*

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<sup>21</sup> Index to Variation Application, Founding Affidavit, para 13, page 7.

<sup>22</sup> 32 of 1944; See also *Fourie NO v Merchant Investors (Pty) Ltd* 2004 (3) SA 422 (C) at 424H-J.

<sup>23</sup> 2016 (3) SA 37 (CC), paras 25 and 26.

*be at odds with public policy. Thirdly, the agreement must “hold some practical and legitimate advantage”.*

[21] It is evident from the record that the court on the day when the matter was settled, did not enter into the merits of the litigation and had no duty to do so. It did no more than to endorse the ending of the *lis* between the parties. In fact, it is evident from the authorities on this point, that a court has minimal discretion to the merits of the settlement as it would essentially interfere with the parties' right to agree to their bargain freely.<sup>24</sup>

[22] *In casu*, the Applicants have clearly signalled their intention to appeal against the judgment on liability entered which is evident from the Request for Reasons in terms of Rule 51(1), dated 26 May 2021. The effect of making the Settlement Agreement an order of court however, precludes the Applicants from bringing an appeal against the findings on the issue of liability.

[23] Section 34 of the Constitution of the Republic of South Africa<sup>25</sup> guarantees everyone the right to have '*any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*' The court is mindful of what was stated in ***Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd & Another***<sup>26</sup> where the Constitutional Court held that:

*'The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. . . . When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously*

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<sup>24</sup> *Theodosiou and Others v Schindlers Attorneys and Others* (14038/2021) [2022] ZAGPJHC 9; [2022] 2 All SA 256 (GJ); 2022 (4) SA 617 (GJ) (20 January 2022).

<sup>25</sup> Act 108 of 1996.

<sup>26</sup> [2016] ZACC 33; 2016 (12) BCLR 1515 (CC) at para 24.

*and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.'*

[24] This approach closes the door for the Applicants to lodge an appeal. It must further be borne in mind that this matter *in casu* does not concern non-compliance with the terms of the Settlement Agreement or a repudiation of the agreement. In addition, regard is further to be had to the fact that the court dealing with the Settlement Agreement had no knowledge as to the underpinning reasons for the Settlement Agreement, namely to appeal the decision of the trial court on the issue of liability. Regard is also to be had to the consideration that the agreement is to “*hold some practical and legitimate advantage*” as set out in ***Eke v Parsons*** (*supra*).

[25] In ***Lane and Fey NNO v Dabelstein and Others***<sup>27</sup> the Court held:

*'Even if the [Supreme Court of Appeal] erred in its assessment of the facts, that would not constitute the denial of the [‘right to a fair trial and to fair justice’]. The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled.'*

[26] It is apparent that the Applicants are not trying to avoid the legal consequences of the Settlement Agreement. There was an attempt to fast track the matter to enable the Applicants to take the decision on appeal which unfortunately backfired on them proverbially speaking. The Applicants would ordinarily have been hard pressed to persuade a court of the that the error was *justus* if regard is

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<sup>27</sup> [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 4.

to be had to the myriad of authorities dealing with *justus error*, as Ms Raof appeared to have had apparent authority at the time when the order was taken. The Constitutional Court in *Makate v Vodacom (Pty) Ltd*<sup>28</sup> dealing with this aspect stated as follows:

*‘ . . .The concept of apparent authority as it appears from the statement by Lord Denning, was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent has authority to act on its behalf. If this appears to be the position to others and an agreement that accords with that appearance is concluded with the agent, then justice demands that the principal must be held liable in terms of the agreement. . . ’*

[27] However, this court cannot ignore the fact that Ms Megaw has stated under oath that her instructions from client, Mr Niel van der Merwe were to concede the quantum as they intended to take the matter on appeal which is confirmed by correspondence.<sup>29</sup> There is nothing on record to gainsay this and neither can it be refuted that there may have been a miscommunication and/or misunderstanding between Ms Raof and Ms Megaw. Furthermore, and as earlier stated, the filing of the Rule 51(1) is indicative of an intention on the part of the Applicants to pursue an appeal.

## **Conclusion**

[28] It is accepted in our law that parties should not lightly be released from an undertaking; however, the unique facts of this matter which is distinguishable from the myriad of cases dealing with *justus error*, enjoins this court to consider whether a refusal to grant the Applicants relief may potentially

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<sup>28</sup> [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 65, See also *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga and Another* [2010] ZASCA 58; 2010 (4) SA 122 (SCA); [2010] 4 All SA 23 (SCA) para 20.

<sup>29</sup> Index to Variation Application, Founding Affidavit, para 11, page 7; Annexure “ALM 1”; Applicants’ Supplementary Concise Heads of Argument, para 5.

be contrary to the law and prejudicial to the Applicants as they will not be able to proceed with an appeal of the matter. Whilst cases in which a judgment will be set aside because of *justus error* are relatively rare and exceptional, I am satisfied that the explanation proffered for the error that led to the conclusion of the Settlement Agreement, namely that the mistake made was due to a *bona fide* miscommunication, is reasonable.

[29] I am however not persuaded that a replacement of the Settlement Agreement with the orders sought in this application can be achieved without the issue of quantum being properly ventilated. I am therefore of the view that the *status quo* before the order granted on 18 May 2021 ought to be restored and that such order falls to be set aside on the common law ground of *justus error*.

### **Costs**

[30] In light of the conclusion to which I have come, it is my view that any cost order will be premature as the matter requires further ventilation.

### **Orders:**

[31] In the exercise of my judicial discretion, after considering the submissions made by the parties, the unique circumstances of this case as well as the papers filed on record I make the following orders:

- (a) The Court Order granted on 18 May 2021 is set aside;
- (b) The issue of quantum is adjourned *sine die*.
- (c) Costs are to stand over for later determination.

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**P ANDREWS**  
Regional Magistrate: Durban

**APPEARANCES:**

FOR THE 1<sup>st</sup> and 2<sup>nd</sup> APPLICANTS:  
Instructed by:

Advocate D W D Aldworth  
Gavin Price Attorneys

FOR THE 1<sup>st</sup> RESPONDENT:  
Instructed by:

Advocate I Veerasamy  
Bothas Attorneys

DATE OF HEARING:

02 August 2022

DATE OF JUDGMENT:

31 August 2022