IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: **NO/~~YES~~**

(2) OF INTEREST TO OTHER JUDGES: **NO/~~YES~~**

(3) REVISED.

***COURT A QUO* CASE NO: LP/PLK/RC84/2017**

APPEAL CASE NO: HCA15/2019

In the matter between:

MAKOENA JOHANNA PHADU **APPELLANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

NAUDE AJ:

[1] This is an appeal from the Regional Court Polokwane against the judgment and order of Magistrate J.T Ngobeni delivered on 17 August 2018.

[2] The Appellant in this matter was the Plaintiff in the Court a *quo* and the Respondent herein was the Defendant. The parties herein are referred to as in the *court* a *quo* in order to maintain harmony with the record before this court.

Facts:

[3] On or about 4 March 2016 at or near Matlala Road, Polokwane. a motor vehicle collision occurred wherein a motor vehicle with registration number [….], driven by Alpheus Boysie Molotsana experienced a tyre puncture and overturned. Eliphus Malesela Phady ("the deceased") was conveyed in the motor vehicle. The deceased sustained multiple injuries from which he ultimately passed away. The deceased was married to the Plaintiff in community of property and was the father of a minor child born on 2 August 2002.

[4] The Plaintiff instituted action proceedings in the Regional Court Polokwane wherein she claimed maintenance for herself in the amount of R146527-00 (One Hundred Forty Six Thousand Five Hundred Twenty Seven Rand) and maintenance for the minor child in the amount of R48 135-00 (Forty Eight Thousand One Hundred Thirty Five Thousand Rand). The Plaintiff further claimed an amount of R15000.00 (Fifteen Thousand Rand) for burial costs. The Plaintiffs total amount claimed amounted to R209 662.00 (Two Hundred and Nine Thousand Six Hundred Sixty Two Rand) plus interest thereon at a rate of 10.25% calculated from date of judgment to date of final payment and costs of suit, as well as interest on the costs awarded a *tempore morae* at 10.25% per annum calculated from the date of the taxing master's *allocatur* to date of payment.

[5] On or about 30 March 2017 the Plaintiff filed a report by KOCH Consulting Actuaries in respect of the quantum of the claim at court and also served the Defendant with a copy thereof. The matter was set down for a pre-trial hearing on 1 November 2017 whereafter it was set down for trial on 29 November 2017. The matter was postponed several times for settlement purposes. The initial offer which was made by the Defendant was rejected by the Plaintiff. Almost one year after Koch Consulting Actuaries filed their report, on 7 March 2018, did the Defendant make a formal offer to settle the plaintiff's claim in terms of Magistrate's Court Rule 18 in terms whereof the Defendant made the following offer, namely:-

(i) Loss of Support for surviving spouse: R132 498-45.

(ii) Loss of Support for the minor Child: R43 633-60

(iii) Funeral Expenses: R15000-00

The offer in total amounted to R191 132-05 (One Hundred and Ninety One Thousand One Hundred and Thirty Two Rand and Five Cents.) The Plaintiff accepted the offer on 8 March 2018 and filed a Notice of Acceptance of Offer at court, which Notice was also served on the Defendant on the 8th of March 2018.

[6] On 9 March 2020 and after the offer had been accepted by the Plaintiff, the Defendant filed and served a notice of withdrawal of the Notice of Offer of Settlement served on 7 March 2018 and simultaneously made another Settlement Offer in terms of Rule 18 for a lessor amount which offer read as follows:-

(i) Concession of merits in favour of the plaintiff.

(ii) Loss of Support for the surviving spouse R119 094-05

(iii) Loss of Support for the minor child R43633.60

(iv) Funeral Expenses R15000.00

The second lessor offer amounted to R177727-65 in total.

[7] It is common cause between the parties that the offer of 8 March 2018 was duly accepted by the Plaintiff in writing. The Defendant did not dispute that the offer which was made by the Defendant was valid and complied with the provisions of Rule 18(5) of the Magistrate's Court Rules. The Defendant further did not dispute that the acceptance was valid and that this consequently led to consensus and conclusion of a contract. The Defendant however argued in the court a quo that there was justus error in that the offer was erroneously made owing to a genuine mistake based on the fact that the Defendant was labouring under the impression that the Plaintiff's actuarial calculations included contingencies and that the witdrawal, therefore, was justified under the circumstances.

[8] At the hearing of the matter, the Magistrate found in her ruling as follows:- *"The court therefore finds that in the absence of consensus between the parties on the offer and acceptance, the offer and acceptance in question is set aside and the parties are given and opportunity to negotiate on the issue of contingencies, or to explore other options that are available to the parties on the aspect of quantum."*

[9] The Magistrate in coming to her finding, stated as follows in her reasons:- *"The situation is different form the case at hand because in the case at hand no information came to light after testimony was led in court, that information* was *always there, which for* some *reason the defendant claims not to have seen. The legal representative of the plaintiff actually submits that it* was *not* a *"mistake" but rather* "a gross *professional negligence". Given the circumstances of this case under the circumstances the court is inclined to agree with the plaintiff on this aspect."*

[10] The Magistrate then went further and referred to the case of ***Sonap v Pappadogianis 1992 (3) SA 234 (A)*** and answered to the three questions as raised in the Sonap-case *supra* as follows:-

"(i) Was *there a misrepresentation* as *to the one party's intention?*

- *In answering the question, the court states that the defendant in the case at hand* was *not misled by anybody in anyway,*

(ii) *If* so, *who made the misrepresentation,*

- *The first answer suffices in this circumstances,*

(iii) *Would a reasonable man be misled by the circumstances or information brought before him,*

- *In the* case *at hand, had the attorneys of the defendant read the report of the actuary with the careful consideration that is expected of them, they would have realised* as *to what* was *stated by the actuary concerning contingencies."*

[11] The Appellant filed an appeal on the grounds that:- (a) the Magistrate

erred in failing to apply the maxim caveat supscriptor to the defendant's written offer as well as to the plaintiff's written acceptance of the said offer, (b) the Magistrate erred in failing to apply the extrinsic evidence rule to the defendant's written offer and the plaintiff's written acceptance thereof, (c) the Magistrate erred in allowing the defendant to renege and/or resile from the validly concluded contract which is binding on all parties, (d) the Magistrate erred in finding that an oversight on the part of the defendant, on the issue of contingencies was sufficient to warrant the setting aside of a valid and binding contract existing between the parties, (e) the Magistrate erred in failing to find that an oversight is not a factor to be considered when determining the issue of the validity of contracts and/or the parties' contractual obligations, (f) the Magistrate correctly found that there was no mistake but ross professional negligence, on the part of the defendant's attorney, but erred in setting the contract aside despite the finding that there was no mistake, (g) the Magistrate erred in finding that there was no consensus when the offer was made and subsequently accepted, (h) the Magistrate erred in finding that the defendant did not apply contingencies when making ' the offer, (i) the Magistrate erred in ordering the parties to go and negotiate on the issue of contingencies, (j) the Magistrate acted *ultra vires* her powers in setting aside a valid contract existing between the parties, (k) the Magistrate incorrectly applied the principle adopted in the case of Adv. T Mphela o.b.o S.... Z... v Road Accident Fund, case number 56873/2012 , (l) the Magistrate erred in failing to apply the principle of *stare decisis* with reference to case law, (m) the Magistrate erred, and acted *ultra vires* her powers, in making a ruling which seeks to contradict the judgments of the Superior Courts.

Case Law:

[12] In **Christie, The Law of Contract in South Africa, 6th edition page 328,** the learned author gives the following guiding observation of the law of contract:

"When a layman says *he made a mistake in entering into a particular*

contract the lawyers comment, after listening to the story,, will often be that this is *the* sort *of mistake for which the law can provide no remedy. Paraphrasing the layman's description of his action* as *mistaken, the lawyer will say that it* was *ill-advised or due to an error of judgment. If the law were to give relief from what, in retrospect, are seen* as *errors of judgment the whole concept of a contract* as *binding and enforceable agreement would be destroyed."*

[13] This court agrees with the above observation. The question is was there iustus error? The Defendant as already stated here above alleges that there was a mistake. In answering this question the court must ordinarily employ the set of questions usually employed in considering iustus error. These questions were clearly set out by Davis AJ (as he then was) in **Prins v Absa Bank Ltd 1998 (3) SA 904 (C)** as follows:-

"(a) I there consensus?

(b) If not, is there dissensus caused by a mistake?

(c) Is the other party aware of the resilers mistake?

(d) Who induced the mistake and was *it done by commission or omission which was either fraudulent, negligent or even innocent?"*

[14] The Defendant needed to show that at the time that the settlement offer was made, the Defendant acted under some misapprehension or misunderstanding as to the terms, import or effect of the contract. In **Dole South Africa (Pty) Ltd v Pieter Beukes (Pty) Ltd 2007 (4) SA 577 (C) at 587** the court held as follows:-

"A party to a contract who has concluded same whilst labouring under a bona fide and reasonable mistake as *to its contents will not be bound by the provisions thereof In particular, where the contracting party* has *been led to believe by the other party that the contract contains certain provisions, which in fact it does not, the party relying upon the misrepresentations, will not be bound by the agreement."*

[15] The Defendant had to prove dissensus in the conclusion of the contract. In

this court's view, the Defendant failed to prove any dissensus and in fact the Defendant's own version is that a valid and binding agreement was entered into. It should be borne in mind that the Defendant made the settlement offer after having had access to the report of Koch Actuary Consultants for almost one year. In the report on page 1 thereof the following was stated:- ***"Note that*** *the above values have not been adjusted for general contingencies save that full allowance for early and late death, in accordance with the life table, has been included in the capitalization process '* The Magistrate was incorrect in her finding that there was no consensus between the parties. There is therefore no need that the further questions posed in **Prins v Absa Bank Ltd** *supra* be determined.

[16] In a dictum in **Absa Bank Ltd v The Master and Others NNO 1998 (4) SA 15 (N)** the following was held:-

"A unilateral mistake, other than a mere error in the motive, also does not allow the party labouring under the erroneous belief to repudiate his apparent assent to a contract except in very narrow circumstances, as explained in George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 471 and National & Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) at 479. The effect of these decisions is that, for a unilateral mistake to vitiate the necessary assent to a contract, the error must be a *justus error. In this respect the 'courts in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself?"*

[17] The Defendant cannot say that there was dissensus between the parties let alone that it arose by virtue of mistake. In this regard the Magistrate was correct in finding that *"it was not a "mistake" but rather* "a *gross professional negligence".*

[18] The *parol evidence rule* prescribes that where parties to a contract have

reduced their agreement to writing, it becomes the exclusive memorial of the transaction, and no evidence may be led to prove the terms of the agreement other than the document itself, nor may the contents of the doci1ment be contradicted, altered, added to or varied by oral evidence.

[19] In the recent case of ***Mike Ness Agencies CC t/a Promech Boreholes v Lourensford Fruit Company (Pty) Ltd*** **(922/2018) [2019] ZASCA 159,** which was before the Supreme Court of Appeal (SCA), Lourensford Fruit Company (Pty) Ltd (Lourensford) attempted to argue that it had verbally agreed to a certain additional term to an agreement which was concluded with Mike Ness Agencies CC *t/a* Promech Boreholes (Promech), which term was not included in the written Agreement between the two parties. In its judgment, the SCA reiterated what it previously held in the case of ***Affirmative Portfolios CC v Transnet Limited t/a Metrorail 2009*** **(1) SA 196 (SCA),** namely that, *"where an agreement is partially written and partially oral, then the parol evidence rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the 'partial integration' rule."* Considering the above, the SCA held, *inter alia,* that the oral portion of the agreement, as contended for by Lourensford, contradicted and varied the written portion of the agreement and as a result thereof, evidence on the oral portion of the agreement would offend the parol evidence rule and be inadmissible. This court therefore is of the view that the Magistrate erred in failing to apply the parole evidence rule in terms whereof when a legal act is incorporated into a document, only the document itself is admissible as to the terms of the legal act, and extrinsic evidence extraneous to the document itself is inadmissible in so far as it tends to contradict or change the contents of the document.

[20] In **Christie (The Law of Contract in South Africa) at pages 329 to 330** the author stated as follows:-

"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; [Wiggins v Colonial Government (1899) 16 SC *425 429; Acacia Mines Ltd v Boshoff 1957 1* SA *93 (T) 101H- 1028 ; Lindsay v Beukes 1958 2 PH A34 (E); Diedericks v Minister of Lands 1964 1* SA *49 (N) 57O-H; Springvale Ltd v Edwards 1969 1* SA *464 (RA) 468 470H; Osman v Standard Bank National Credit Corporation Ltd 1985 2* SA *378 (C) 388F-I], in not bothering to read the contract before signing; [Ex parte Rosenstein 1952 2 SA 324 (T); Standard Credit Corporation Ltd v Naicker 1987 2 SA 49 (N)J; in carelessly misreading one of the terms; [Patel v Le Cius (Pty) Ltd 1946 TPD 30]; in not bothering to have the contract explained to him in* a *language he can understand; [Mathole v Mathie 1951* a *SA 256 (T)], in misinterpreting* a *clear and unambiguous term, {Van Pletzen v Henning 1913 AD 82 89; Irwin v Davies 1937 CPD 442-:447], and in fact in circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is iustus. It is not sufficient simply to avoid condemnation* as *careless or inattentive , for the mistaken party must go further and discharge the onus of proving that his mistake was, in the eyes of the law, reasonable."*

[21] **In PM obo TM v Road Accident Fund (1175/2017) [2019] ZASCA 97; [2019] 3 All SA 409 (SCA); 2019 (5) SA 407 (SCA) (18 June 2019)** the court held at paragraph 55 thereof as follows:-

"[55] The next issue to consider is the effect of the settlement agreement concluded by the parties. Madlanga J, writing for the majority of the Constitutional Court in Eke v Parsons, had the following to say in this regard:

'The effect of a settlement order is to change the status of the rights and obligations between the parties. Save *for litigation that may be consequent upon the nature of the particular order, the order brings finality to the /is between the parties; the /is becomes res judicata (literally, "a matter judged'?- It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement*

may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a mandamus.

Litigation antecedent to enforcement is not necessarily objectionable . That is so because ordinarily a settlement agreement and the resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute - depending on the nature of the litigation - might have entailed many days of contested hearing.'

[56] It is *correct that when* a *court is called upon by the parties to make a settlement agreement an order of court, it does not have to do so. It has* a *discretion. In this regard, Madlanga J said the following in Eke:*

'This in no way means that anything agreed to by the parties should be accepted by a *court and made an order of court. 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. On this Hodd says:*

"(l)f two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to court to have that agreement made an order, merely on the ground that they preferred the agreement to be in the form of a judgment or order

because in that form it provided more expeditious or effective remedies against possible breaches, it seems *clear that the court would not grant the application."*

That is so *because the agreement would be unrelated to litigation.*

Secondly, "the agreement must not be objectionable, that is, its terms must be capable, both from a *legal and* a *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 be at odds with public policy. Thirdly, the agreement must hold some practical and legitimate advantage ".'*

[22] In ***PM obo TM v Road Accident Fund*** *supra, the court held further at paragraph* 57 *to 60 thereof as follows.-*

"[57] It is apparent from this analysis that no discretion can be exercised in the air. If the court is to exercise its discretion against making a settlement an order of court, there must be a basis for it to do so. That basis may be gleaned from the facts pleaded before it by the parties or objectively available factors. What this means is *that, for the court to be able to make the settlement an order of court, it must have jurisdiction. that is to say, the power to adjudicate upon, determine and dispose of a matter. The court must be satisfied that the order that it* is *required to make is competent and proper in the sense that it will have the power to compel the person against whom the order* is *made, to make satisfaction. Secondly, it must satisfy itself that the agreement* is *not objectionable and that it must hold* some *practical and legitimate advantage. Where necessary, the court must play an oversight role when it is of the opinion that the terms of the agreement are inadequate. In such instances it may even insist that the parties effect the necessary changes to the terms of the settlement agreement as* a *condition for the making of the order.*

[58] This analysis makes it clear that the court has a discretion to make a settlement an order of court. In exercising its discretion, it must

consider all relevant factors in light of the guidelines set out by the Constitutional Court in Eke. As indicated, in the present case the trial court refused to make the settlement agreement an order of court on the ground that it was not satisfied that it was in accordance with the documents and pleadings filed of record.

[59] In my view, this was an irrelevant consideration and its effect was *to second-guess the parties' decision to agree to settle the issues as they defined them in their pleadings. It is not for the court to vary the issues so defined. It is for the parties to drive the litigation process. It must be recalled that when the matter was called by the court of first instance, counsel for the respondent informed the court that the parties were busy negotiating settlement and when it* was *later called, the parties informed the court that they had settled.*

[60] It was not suggested that the order which- the parties requested the court to make was improper or incompetent, or that the agreement to settle was in any way objectionable or was as a result of any collusion between the parties. None of these were raised with the parties and for that reason it could not have been used as a ground to refuse to make the settlement agreement an order of court."

[23] This court is in agreement with the approach of **Christie *supra,*** as *well* as *the approach followed in* ***P M*** **obo** ***T M v Road Accident Fund*** *supra. The Magistrate by setting aside the settlement agreement entered into between the parties did not consider all relevant factors in light of the guidelines* set *out by the Constitutional Court in* ***Eke v Parsons [2015] ZACC 30;*** *In paragraph 27 to 28 held* as *follows:-*

"[27] The less restrictive approach adopted in this judgment Ls in line with the wide power that courts have to regulate their process. This power is expressed in section 173 of the Constitution, which provides:-

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the

interest of justice."

[28] This is what this Court has said about the inherent power:

"[T]he power conferred on the High Courts, Supreme Court of Appeal and this Court in Section 173 is not an unbounded additional instrument to limit or deny vested or entrenched in rights. The power in Section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction." It is clear that only the Constitutional Court, Supreme Court of Appeal and High Court of South Africa is vested with an inherent power and not the Magistrate's Court, and in this present matter the Regional Court The Magistrate acted beyond her powers and jurisdiction by setting aside the settlement agreement and ordering the parties to negotiate further on the issue of quantum. The Settlement agreement entered into between the parties dated the 8th of March 2018 is a valid and binding agreement, is not contra bones mores and is there no other reason in law why this agreement should have been set aside. The appeal must therefore succeed.

[24] The only issue remaining is costs. The general rule is that the· successful party should be awarded costs. The Defendant did not oppose the Appeal, but there is in this court's view no reason why the general rule should not be applicable and in the result the appeal succeeds with costs.

Order:

[25] **The following order is made:-**

1. **Application for condonation for the late prosecution of the appeal is granted;**

2. **The appeal is upheld with costs, including the costs of the court *a quo;***

3. **The Notice of Acceptance of the Offer dated 08/03/2018 is made**

an Order of Court;

4. **The Order made by the Court *a quo* setting aside the accepted offer is set-aside and it is substituted with the following order:-**
***"The Notice of Acceptance of the Offer made by the Defendant on 08/08/2018 is made the order of* court."**
5. **The Defendant is ordered to pay to the Plaintiff an amount of R191 132.05 together with interest thereon at the rate of 10.25% per annum from date of Judgment to final payment.**

M. NAUDE
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

I AGREE, and it is so ordered.

M.G PHATUDI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

HEARD ON:	**21 AUGUST 2020**
ORDER DELIVERED ON	**21 SEPTEMBER 2020**

For the Appellant:	**Mr. L.M. Mabotja**
Instructed by:	**Makwela & Mabotja Attorneys**
For the Respondent:	**None**