

SOUTH AFRICA / JUDGMENT

Britz and Others v Matloga and Others (21653/2011) [2015] ZAGPPHC 171 (25 March 2015)

[2015] ZAGPPHC 171

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

21653/2011

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION:
PRETORIA

CASE NO: 21653/2011
DATE: 25
MARCH 2015

In the matter between: W H
BRITZ.....1st
APPLICANT
D T JANSE VAN
RENSBURG.....2nd
APPLICANT
A V VAN
BUUREN.....3rd
APPLICANT
and
E T
MATLOGA.....1st
RESPONDENT
M M
MATLOGA.....2nd
RESPONDENT
THE REGISTRAR OF DEEDS,
PRETORIA.....3rd

RESPONDENT

JUDGMENT

KHUMALO J

INTRODUCTION

- [1] The 1st and 2nd Applicants who are practising attorneys and directors in a firm Britz van Rensburg Incorporated together with the 3rd Applicant litigating as businessmen, are in this Application seeking the rescission or setting aside of an order entered against them by consent in favour of Mr E T Matloga and Mrs M M Matloga, (“the 1st and 2nd Respondents”) husband and wife respectively, on 7 March 2014 by Honourable Mr Justice Tuchten.
- [2] No order is sought against the 3rd Respondent who is cited only as an interested party.

BACKGROUND FACTS

- [3] The order to be rescinded was made during the course of a trial in an action that Respondents as Plaintiffs instituted against the Applicants as Defendants, effectively terminating the action. Applicants’ legal representatives drafted and compiled the order which was assented to by the Respondents, whereafter with the consent of both the Applicants and the Respondents duly represented by their respective legal representatives made an order of court by Tuchten J. The Applicants were at the time represented by Mr Myburgh as their counsel instructed by E Y Stuart Attorneys. Both representatives’ instructions were thereafter terminated. They are together henceforward referred to as “Applicants’ erstwhile legal representatives”. The Respondents were represented by their present counsel Mr Kruger instructed by Van der Merwe attorneys. Applicants allege that Myburgh and Stuart Attorneys had no mandate to settle the action as set out in the order.
- [4] The Respondents had claimed in the action that the Applicants transfer an immovable property described as Portion 44 of Erf 263 Phillip Nel Park also known as 19 Ernest Bouresse Crescent, Phillip Nel Park, Pretoria (“the property”) back into their names. The Respondents owned the property and allege that Applicants fraudulently transferred the property into their names, acting in collusion with one Nico Oosthuizen (“Nico”), an agent representing a company called OBI. Nico is said to have

misrepresented to the Respondents that OBI was going to take over the administration and restructuring of their debts and indebtedness to their creditors and in return made them sign an agreement of sale of the property to an unknown purchaser and of lease of the property back from the said purchaser.

- [5] The Respondents also alleged in the action that subsequent to the signing of the agreement on 2 March 2009, Applicants fraudulently caused the property to be registered in Applicants’ names and thereafter purportedly let the property to the Respondents. A transaction they

held was of no value to them. Alternatively that the deed of sale in terms of which the property was transferred to the names of the Applicants was signed neither by them or an agent acting on their written instructions, therefore invalid (not in compliance with s 2 (1) of the Alienation of Land Act 68 of 1981. The trial was set down for three days, being 7, 10 and 11 March 2014.

- [6] It is common cause that during the trial on 7 March 2014, in the course of 1st Respondent's evidence in chief, it became apparent that the signatures in the deed of sale and transfer documents were in fact not those of the parties thereto, specifically those of the Respondents. On such realisation Tuchten J enquired if the manipulation of the contracts was reported to the South African Police Service ("SAPS"). Myburgh responded by requesting a short adjournment in order to discuss how to proceed with the matter with his clients. He together with Applicants' attorneys then consulted Van Rensburg for consent or a mandate to settle the matter. Subsequent to obtaining the consent the attorneys telephonically advised Respondent's legal representatives that the Applicants had agreed to the relief sought by the Respondents and to pay the costs. Myburgh later returned to court with a draft order that read as follows:

'Whereas the 1st, 2nd and 3rd Defendants, during the proceedings on 7 March 2014 became aware of the existence of documents prima facie indicating irregularities

pertaining to disputes in this action,

And whereas the 1st, 2nd and 3rd Defendants are desirous of resolving the dispute with the Plaintiffs and of the property investigating the allegations made during the said proceedings,

Therefore the following order is made:

1. The 1st, 2nd and 3rd Defendants undertake and are ordered to register the property, being 19 Ernest Bouress Crescent, Phil Nel Park, Pretoria West, into the names of the Plaintiffs, and further undertake and are ordered to sign all documents and to take all necessary steps necessary to give effect hereto, which registration must take place within 3 months of date of this order.
2. The 1st, 2nd and 3rd Defendants undertake and are ordered to pay the costs of the action, jointly and severally, the one to pay the other to be absolved.
3. It is noted that the Plaintiffs undertake to assist the 1st, 2nd and 3rd Defendants in any further investigation into the aforesaid irregularities, including any civil and or criminal proceedings to be instituted by the 1st, 2nd and 3rd Defendants against any other party involved on the irregularities.

The Respondents agreed to the order and therefore was by consent made an order of court.

APPLICATION

- [7] The Applicants in this Application are denying that they gave their erstwhile legal representatives authority to settle the matter as set out in the draft order presented to court. In their Founding Affidavit supporting the Application for rescission of the order, 1st Applicant (“Britz”) alleges that the settlement was reached without his knowledge or input since he was not in court that day as his attorney advised him that his testimony was not going to be required. He however confirms that he was aware that their erstwhile legal representatives contacted Van Rensburg telephonically during the adjournment and consulted with him on the matter.
- [8] According to him his erstwhile attorneys explained to him only on 12 March 2014 that the original documents were tampered with and that certain signatures were clearly fraudulently inserted or at least manipulated and that it caused the Judge during the trial to stand down the matter as to address his concern on the issue.
- [9] Van Rensburg filed a confirmatory affidavit stating that he also did not attend the trial on 7 March 2014 for the same reason as Britz and confirmed that at 12h45 on that day he received a call from their erstwhile legal representatives, informing him of the evidence of manipulation of the original documents. They also told him about Tuchten J’s remarks on the charge of fraud and his recommendations that the matter be referred to the public prosecutor’s office for immediate investigation.
- [10] He alleged that their erstwhile legal representatives strongly advised him that the matter be settled with immediate effect as it would severely prejudice him and Britz’s standing as officers of the Court if it is found that they were involved in any fraudulent action which could have caused prejudice to any other party in the proceedings. Also that it was due to their erstwhile legal representatives’ assurance that, the fraud was clearly evident from the documents such that they did not see their way open to proceed with the trial that he was left with no choice but to ask them to resolve the matter in the best possible manner and to do whatever is necessary to limit his exposure.
- [11] Notwithstanding Van Rensburg’s confirmation to have been consulted as aforesaid, he all the same proceeded to allege in his affidavit that he would not have consented to such settlement if the true facts were made known to him or if the contents of the draft order were discussed with him. He claimed that the settlement agreement was made an order of court without him knowing the true facts.
- [12] The 3rd Applicant (“Van Buuren”), like Britz denies in his confirmatory affidavit that he was contacted or gave an instruction to the legal representatives to settle the matter.

ANSWERING AFFIDAVIT

- [13] The Respondents’ Answering Affidavit was deposed to by Daniel J Basson, their attorney (“Basson”). He confirmed in it that the trial was indeed stood down for Myburgh to get proper instructions from his clients. According to Basson during the adjournment Applicant’s legal representatives telephonically advised him that they have obtained

Applicants' instructions to agree to the relief sought by the Respondents and to pay the trial's wasted costs. There were no settlement negotiations taking place at the time between the parties, but, Myburgh was of the opinion that it was in the best interest of the Applicants to settle the matter in terms of the draft that was made an order of court, considering that Applicants would have been at a distinct disadvantage as officers of the court to be subjected to an investigation.

- [14] He further, on behalf of the Respondents denied that any of the Applicants was entitled to the rescission of the order, for the reason that the three of them are together involved in business in a partnership known as WAD Ondernemers that purportedly bought the Respondents' property and in that sense Van Rensburg had authority either express, alternatively implied, to bind the three of them or the partnership when he instructed their erstwhile legal representatives to resolve the matter in the best possible manner and do whatever is necessary to limit the exposure, after the circumstances and the evidence of the manipulation of the deed of sale were communicated to him. They reckon that Applicants cannot, in any way whatsoever complain that their legal representatives had settled the action without consulting them.
- [15] In addition, Basson pointed out that in addition to Myburgh and E Y Stuart Attorneys, Applicants also had another attorney in court from "Britz van Rensburg", Applicants' firm, with a watching brief who sat throughout the trial and with whom their erstwhile legal team conferred when the order was made. The Respondents contend the erstwhile legal representatives nevertheless had authority to settle the action with or without the instruction of the Applicants.

REPLYING AFFIDAVIT

- [16] Applicants replied in a lengthy Replying Affidavit that was +- 120 days out of time and filed +- 90 days from the date they were furnished with further documents in reply to Rule 35 (2). The excuse they proffered was that the issue of the manipulation of documents needed a thorough investigation. Britz and van Buuren averred in their papers that they became aware of the nature of 1st Respondent's testimony on 12 March 2014 in the meeting they held with their erstwhile attorneys. I deal with that allegation hereunder.
- [17] However it is clear that the issue persisted from the pleadings and was clearly articulated thereat. Applicants were already apprised of the issue when they launched their Application as it was because of the realisation that the manipulation was real that prompted their erstwhile legal representatives on 7 March 2014 to seek their consent to settle, leading to the draft order consenting to the Respondents' claim being made an order of court. Britz in the founding affidavit and Reply to Rule 35 (2) Notice also confirmed that their new attorneys were in possession of the documents by 4 April 2014 as they formed part of the documentation they received from their erstwhile attorneys. Therefore the delay to file the Answering Affidavit was inexcusable.

- [18] It is noted that the Applicants admit in their Replying Affidavit that Van Rensburg had the authority to give their erstwhile legal representatives instructions on behalf of the partnership (the three Applicants) to resolve the matter in the best possible manner and do whatever was necessary to limit their exposure. They also confirm that they do not criticise Myburgh's decision to adjourn so that he can consult them on settling the matter as well as agree that an associate from their office who held a watching brief was informed of the mandate received from Applicants to settle the matter.
- [19] They however maintain that the subsequent settlement and order was made without their mandate and end of by denying being responsible for any manipulation made on the deed of sale. They allege that the settlement creates an impression that they had something to hide and wanted to sweep it under the carpet.

DEFECTS IN THE APPLICATION

- [20] The Notice of Motion or Founding Affidavit does not indicate the rule or the law in terms of which the Applicants are bringing their Application. The Applicants only make the assertion in the Replying Affidavit that it is brought in terms of Rule 41 alternatively the common law, they must mean Rule 42 as submitted by Applicants' counsel, Mr Els, since the Application is said to be based on the fact that the order was erroneously sought or granted, in the absence of the party affected thereby.
- [21] However for Rule 42 to be applicable, one of the jurisdictional facts in paragraphs (a) to (c) must exist. In this instance the Applicants have alleged that Rule 42
- (1) (a) is applicable, alleging that the order was erroneously sought in their absence. But the Applicants' representatives, that is, E Y Stuart Attorneys and Myburgh were present at the time when the order was granted signifying Applicants' presence. It follows that the court does not have the discretion to set aside the order under that sub rule as the presence of the legal representatives signifies the presence of a party, as correctly argued by the Respondent's Counsel; see *Nthlabezo v MEC for Education, Culture & Sport, Eastern Cape* 2001 (2) SA 1073 (Tk) AT 1082 C-F. The order was made amidst a trial with Myburgh conducting the defence on behalf of the Applicants, therefore not made in the absence of the Applicants. Counsel for Applicants submitted that in *Herbstein van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of SA* 5th edition, page 943 it pointed out that the rule does accommodate an incident where judgement was granted by consent but as a result of an error. However it is proper only if it was granted in the absence of the party and legal representation.
- [22] Furthermore, notwithstanding Applicants making a serious allegation against Myburgh and E Y Stuart Attorneys that they acted without their authority, and relying primarily on that allegation to be the cause for petitioning the rescission or setting aside of the order, the erstwhile legal representatives were not notified of the Application or cited in the proceedings to set aside the order. Their interest in the matter is very significant and fundamental to the veracity of Applicants' Application as their conduct allegedly gave rise to

the Plaintiff's cause in the motion. Also they might be prejudiced by the court's decision. Even after their significance was pointed out, the Applicants persisted with such failure that is contrary to the provisions of Rule 42 as well on the basis of which they had also sought to seek their relief. In subsection 3 it reads:

'The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interest may be affected have notice of the order proposed.'

[23] The Applicants dealt with the merits of the matter only in the Replying Affidavit, proceeding to set out a version that is not founded in their initial Affidavit that is speculative and based on the opinions of Nico Oosthuizen and the Conveyancing attorney, instead of facts. As a result the contents of paragraphs [28] and [29] of the replying affidavit specifically do not warrant any attention. I could not be persuaded otherwise. The court also kept in mind that the case which the respondent is called upon to meet is in the Founding affidavit. The applicant must stand or fall by it and the facts alleged therein: see *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635 H. The version also differs from their Plea in the action when the merits to determine a good cause are supposedly instructed by what is in the pleadings.

ISSUE/S TO BE DETERMINED

[24] What is to be considered is the Applicant's Application under common law that seeks to set aside a judgment obtained by fraud or iustus error. The ground specified in the Founding Affidavit is that their erstwhile legal representatives, although granted authority to settle as per Van Rensburg, were not authorised to tender a draft order with the terms thereanent, which draft in essence consented to the Respondent's claim. In that instance allege that there was an iustus error.

[25] A question to be answered by the Plaintiff is whether the Applicant's erstwhile representatives had the authority to compromise the Applicant's defence and settle the action as per the draft order that was made an order of court?

APPLICABLE LAW

[26] In *Mudzingwa v Mudzingwa* 1991

(4) SA 17 (ZS) Gubbay JA (as he then was) stated that:

"It is firmly established that a judgement can only be rescinded under the common law on one of the grounds upon which restitution in integrum would be granted, such as fraud or some other just A cause including Justus error ... certainly a litigant who himself was negligent and the author of his own misfortune will fail in the request for rescission."

Therefore if there was an actual iustus error, there present a reasonable explanation of such error between clients and the legal representatives, that was a sufficient ground for a rescission and setting aside of the consented order. The grounds for rescission under common law are premised on considerations of justice and fairness whereby the Applicants bore the onus of showing the existence of a reasonable and satisfactory

explanation as to why and how then a judgment came to be entered against him.

[27] Gubbay CJ in *Georgias v Standard Bank Chartered Finance Zimbabwe Ltd*, 2000 (1) 126 (Z) at 132G sets out the applicable principles in more detail, as follows:

“The adoption of those principles to an application to rescind a judgment given by consent enjoins the court to have regard to:

- (a) The reasonableness of the explanation proffered by the applicant of the circumstances in which consent judgment was entered;
- (b) The bona fides of the application for rescission;
- (c) The bona fides of the defence on the merits of the case which prima facie carries some prospect of success; a balance of probability need not be established.

As has been stated repeatedly too much emphasis should not be placed on any of these factors. They must be viewed in conjunction with each other and with the application as a whole. An unsatisfactory explanation may be strengthened by a very strong defence on the merits.”

[28] Gubbay CJ continued the elucidation by stating that:

“Although lack of consent is undoubtedly the predominant factor in the decision of whether or not to set aside a judgment purported to have been given with the consent of the parties, regard must also be had, in view, to the factors alluded to by Blackie J and mentioned by Mr De Bourbon. I think that only where the defence offered to the action is virtually unarguable or the delay in bringing the application inordinate unsatisfactorily explained, should a court decline the relief of rescission. I agree with this.” (my emphasis)

[29] In determining existence of consent or lack thereof in these instances where an order is ostensibly by consent, parties should bear in mind that if a party elects to limit the ambit of his case, the election is usually binding. As a result a party is not entitled to resile from an agreement deliberately reached at a pre-trial conference or during the trial unless special circumstances are present; see *Filta –Matix (Pty) Ltd v Freudenberg & Others* [1997] ZASCA 110; [1998] (1) SA 606 (SCA) 614B-D. Where, as in this case the agreement is confirmed by Counsel in open court, and then made a judgment or order of a court, the principle is said to apply with even more force. See MEC for Economic Affairs, Environment & Tourism: *Eastern Cape v Kruizenga and Others* 2010 (4) SA 122 (SCA).

- [30] Likewise in *Keothepile v Keothepile and Another* 2001 (1) BLR 34 (HC) where the judgment was obtained by consent in the presence of both parties and subsequently sought to be set aside on the basis that the attorney misunderstood what the client was agreeing to, the court held that:

“If a judgement made in open court on the strength of clear positions from both parties stood to be rescinded, it would be impossible to imagine why anyone would trust or consider worthy any judgments of the courts. The greatest power of a judgment of a court is that it would clarify a position where there was previously a conflict. A third party ought to be able to act on the strength of a judgement of a court, confident that it would not be rescinded for such flimsy and weak reasons as had been offered by the Applicant in this case.”

- [31] As the act of instructing an attorney to institute or to defend an action and to brief Counsel in a matter, sends a message to the public that they are clothed with the authority that goes with the conception of legal representation. Persons who deal with them would believe in their ability to negotiate and settle the issues between the parties including the claim or defence in the action. Van Zyl J in *MEC for Economic Affairs* held that:

“by instructing the State Attorney to defend the action and to brief counsel to conduct his defence, the appellant represented to the outside world that his legal representatives had ‘the usual authority that applies to their office’. And by not informing the respondents that their authority was limited, he ‘must reasonably have expected that persons who dealt with his agents would believe that they had the authority to compromise the claims.’”

So, the court concluded that, appellant was estopped (prohibited) from denying the authority of his legal representatives to agree to the settlement.

- [32] The court in *Alexander v Klitzke* 1918 EDL 87 referred to in *MEC for Economic Affairs* did not accept a Defendant’s allegation that the general authority to his attorney did not authorize him to accept Plaintiff’s tender of settlement and held that:

“the authority of a power of attorney which is filed by the client, to carry his case to final end and determination, does include authority to make bona fide compromise in the interests of his client, and at any rate, if a client wishes to repudiate such a compromise made on his behalf, then I certainly think that the repudiation should be a timeous one.” (my emphasis)

- [33] However, as it was agreed by the courts, an instruction to an attorney to sue or defend a claim may include the implied authority to make compromises/concessions provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client’s authority where, objectively viewed, it appears that the agreement is unjust and not in the client’s best interest. In *MEC for Economic Affairs* the court made an example by referring to *Mfaswe v Miller* (1901) 18 SC 172 where an attorney’s clerk compromised a claim on the day of the trial before the client had arrived at court. Thereafter the client sued his attorney for the full amount of the original claim. The court said that the clerk had accepted the compromise ‘in the exercise of the discretion

vested in an attorney' at p175. And because he acted in good faith, and was not negligent, the court held that the attorney was not liable to the client in damages.

- [34] The common feature in all these authorities is the general principle that a party is bound by his attorney's actions consequent upon the authority conferred by a power of attorney. It is so, as long as the attorney exercises the authority in good faith and in the best interest of the client. To ensure that it is in the client's best interest, it has been an accepted practice that the attorney will make sure that it meets with clients' approval. In that instance there will be no doubt whether an attorney acted bona fide or in the best interest of the client.
- [35] As a result it has been settled law that a client's instruction to sue or defend a claim does not include the authority to settle or compromise a claim or defence without the client's approval; see *Bikitsha v Eastern Cape Development Board and Another* 1988 (3) SA 522. In some authorities it has been confirmed that 'a general mandate does not authorize an attorney to act in a manner adverse to his client's interest'; see *De Vos v Calitz and De Villiers* 1916 CPD 465; *Forget v Forget* 1921 EDL 164. In *Ras v Liquor Licensing Board Area no 11 Kimberley* 1966 (2) SA 232 © at 237E-238C it was held that for acts of great prejudice an attorney needs a special mandate. It is instructive that he thus has no authority to waive his client's rights unless specially authorized thereto. See also *Goosen v Van Zyl* 1980 (1) SA706 (O) at 709 H.

ANALYSIS

- [36] In this matter Els on behalf of Applicants argued that where there is a prejudicial settlement without a mandate, the setting aside of the order or judgment would be justified. He argued that Myburgh needed a special mandate to agree to the terms set out in the draft and he never requested for it. Also that estoppel would not apply. He argued that Van Rensburg was not told the whole facts so as to be able to discern the type of mandate required and make up his mind. So, therefore in essence Myburgh did not have a proper mandate.
- [37] On the other hand, the Applicants confirmed that they gave their erstwhile legal representatives the mandate or authority to settle the matter in the best way possible to minimise any exposure to them. It is common cause that the said authority/mandate as alleged was given after the erstwhile legal representatives specifically approached Van Rensburg when they were confronted by a situation they regarded to be potentially prejudicial to their clients and felt that the matter needed to be resolved in a specific manner that required Applicants' approval. Also confirmed that Applicants through Van Rensburg were informed of the difficulties in the matter, the need for immediate settlement and how it could be resolved when such mandate obtained.
- [38] As per Van Rensburg, Applicants were informed of the evidence of the 1st Respondent, the presiding officer's concern and the apparent manipulation of the documents. Also of the erstwhile legal representatives' believe in such evidence, that they could therefore not see their way continuing with the matter under those

circumstances and the risk and urgency of settling the matter. He was therefore clearly apprised of all the facts that Applicants needed to know including an explanation on the implication of the evidence to him and Britz as officers of the court, an approval being sought to settle the matter with immediate effect. It is also of importance to appreciate that Van Rensburg is not a layman but a practising attorney who is under the circumstances expected to have a better understanding of the implication described and risk. In all likelihood he would not have agreed to settle the matter without understanding the terms to be proffered. He is disingenuous that he was not informed of the whole facts as much as it cannot be true that he was not aware of the terms that were to be put in the draft when he agreed to settle the matter. That conclusion is supported by the uncontested statement that Applicants' legal representatives called and informed the Respondents' attorney, soon thereafter, that the Applicants have consented to an order in terms of the Respondent's prayers and to pay their wasted costs.

[39] Furthermore, Van Rensburg's assertion that he was left with no choice confirms that he acknowledged that they were exposed in terms of risk and had to settle. That is why he requested counsel to settle in accordance with what was suggested but to limit their exposure, instead of requesting Counsel to avoid exposure. For the reason that the manipulation of the contract was apparent, Mr Kruger correctly argued that the deed of sale was in fact null and void, being in contravention of the provisions of s 2 (1) of the Alienation of Land Act 68 of 1981 that reads:

"No alienation of land after the commencement of this section shall, subject to the provisions of s 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

The contract was unenforceable and the subsequent transfer invalid. He submitted that there are no prospects of Applicants succeeding in their defence. Hence their erstwhile legal representatives' was of the view that there was no point in proceeding with the trial and Van Rensburg's acceptance that he had no choice under the circumstances also comprehensible. That validates Myburgh's conduct.

[40] Applicants tried to argue that even though they agreed to settle the matter, the terms that were consented to by their legal representatives was prejudicial to them. They allege that the attorney was therefore mistaken in proffering the draft order. The order itself made provision for an undertaking by the Respondents to assist the Applicants in any further investigation into the aforesaid irregularities, including any civil and or criminal proceedings to be instituted by the Applicants against any other party involved in the irregularities. It was a well thought out order that intended to limit the exposure as was required by the Applicants. The Applicants allegation that the settlement creates an impression that they had something to hide and wanted to sweep it under the carpet is therefore far from the truth.

[41] It should be kept in mind that as indicated earlier the Applicants' legal team already had an implied authority to conclude settlement agreements of the litigation on behalf of their clients stemming from the power of attorney, but when Myburgh recognised what adverse effect the apparent falsification of the signatures in the deed of sale might have to the Applicants or the possible prejudice they might suffer, he sought an adjournment to get a special approval. Van Rensburg in turn unequivocally furnished the legal team with the mandate to settle, and recognising the risk involved in settling, requested that Counsel limit the risk. In such instance, while recognising that there may be cases in which even a compromise can be set aside for mistake Miller JA nevertheless said the following in Gollard & Gomperts

(1967) (Pty) Ltd v Universal Mills Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A) at 923-D that:

"Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the court must bear in mind when it considers a complaint by a dissatisfied party that, had he not laboured under an erroneous belief or been ignorant of certain fact, he would not have entered into a settlement agreement."

The order operates as res judicata; see Van Zyl v Niemann 1964 (4) SA 661 (A) at pages 669 and 670.

[42] The failure to procure an affidavit from the erstwhile representatives, Myburgh, E Y Stuart attorneys and the attorney from the Applicants' firm who was on a watching brief on the date the order was made, also the failure to serve or notify them of the Application is telling of the truthfulness of the Applicants allegations and exacerbates the doubts. What is of further significance is that there is no confirmation in the Applicant's affidavit that they did not want to settle nor do they evince the manner in which they wanted their erstwhile legal representatives to settle the matter.

[43] In K R Sibanyoni Transport Services CC and Others v Sheriff of the High Court TPD and Another in Re: Mtsweni v Sibanyoni and Another (30639/030 [2005] ZAGPHC 118 (15 November 2005) agreeing with Gubbay CJ Van Rooyen AJ stated that:

"The fact that there was no agreement would not entitle the applicant to success. He has to show that he also acted bona fide and reasonable under the circumstances. If I find that the applicant has, on the evidence before me agreed to the settlement I need not consider whether he also acted reasonably. The Application is of course to be decided in accordance with Plascon Evans Paints Ltd rule in so far as the relief should only be granted if the facts as stated by the Respondents together with the admitted facts in the Applicant's affidavit justify such an order. There may be exceptions to the general rule. For example, where the allegations or denials of the Respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on papers. [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 € to 635 C

In *Hlobo v Mutilateral Motor Vehicle Accidents Fund* [2000] ZASCA 89; 2001 (2) SA 59 (SCA) the following is stated:-

“[10] The proper approach to the question, in my view, should have been as follows. A compromise (or transacio) 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.

[44] Applicants also referred to matters of *Briston v Hill* 1975 (2) SA 505 (N) and *De Wet v Western Bank Ltd* 1979 (2) SA 1031, although in *casu Myburgh* and the legal team have not been alleged or proven to have acted negligently, even where there was a likelihood of negligence, if the conduct was due to a bona fide intent, and the outcome not unjust it would not cause the setting aside of the order as already illustrated in this matter. The Applicants did not present a reasonable and convincing explanation of the alleged iustus error that measures up against what is required for rescinding or setting aside an order made with the consent of the legal representatives.

[45] The defence the Applicants attempted to raise in the Answering affidavit lacked any bona fides as well as they were not entitled to reformulate their defence. They are bound by their plea. In *Hamilton v van Zyl* 1983 (4) SA 379 (E) Mullins J at 383H-384B stated that:

“These defences to the enforceability of the sale agreement attempt to rely upon the motives which induced the Appellant to conclude the agreement, as well as the merits of the dispute which the parties sought to compromise. They therefore cannot be sustained”. A defendant is not however entitled to rely on defences relating to the motives which induced him to agree to the compromise, or to the merits of the dispute which it was the very purpose of the parties to compromise.”

[46] Applicant's erstwhile legal representatives did seek from the Applicants a specific mandate/approval to settle, which was granted. They satisfactorily complied with their clients' mandate, exhibiting a flawless conduct and very good intentions. They accordingly discharged their duties professionally in a standard beyond reproach. It cannot be argued that they could have been mistaken. They, as in accordance with what is propagated in *Ras* all the time acted in the best interest of the client.

[47] Having considered the matter, I find that the Applicants denial of the authority of their erstwhile legal representatives to settle the matter is not only unreasonable but disingenuous as well. There is no satisfactory explanation of the alleged error of what exactly the attorneys got wrong and how it was committed explaining what exactly was supposed to be the agreed settlement. As a result the Applicants failed to make out a case that the court order that was made on 7 March 2014 was as a result of iustus error by their legal representatives as alleged but by consent between the parties.

[48] Under the circumstances I hereby make the following order:-

[48.1] The Application for Rescission of the court order made on 7 March 2014 by Tuchten J is dismissed with costs.

N V KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION-PRETORIA

Counsel for Applicants: A P J ELS

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Prepared on 10 October 2026 · Esheria