

SOUTH AFRICA / JUDGMENT

Hawkwind CC v Goddard (2589/2010)

[2010] ZAECPEHC 59 (16 September 2010)

[2010] ZAECPEHC 59**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

Chetty

CASE / FILE NUMBER

2589/2010

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: 2589/2010

HAWKWIND CCApplicant

And

SALOMIE GODDARDRespondentCoram: Chetty, J

Date Heard: 16 September 2010

Summary: Practice – Order of court – Application to set aside previous court order –
Circumstances under which permissible to do so – Applicant's instructions to attorney not
incorporated in founding affidavit – Whether attorneys omission amounting to just error –
Omission constituting a reasonable mistake vitiating agreement of compromise – Order set aside

JUDGMENT

Chetty, J

- [1] The applicant conducts business repairing accident damaged vehicles and trades under the name Auto Bodyworks in Port Elizabeth. Although the respondent, somewhat disingenuously, denied being employed by the applicant it is apparent from the plethora of documentation annexed to the affidavits that she was. It is furthermore not in issue that during the currency of her employment she forged symbiotic relationships with the principals and staff of various brokerages accustomed to referring work to the applicant.
- [2] The respondent ceased her employment with the applicant in May 2010. During August 2010 the applicant sought an order as one of urgency, restraining and interdicting the respondent from soliciting business from any of the brokers with whom it conducted business contending that the respondent was contractually precluded from doing so by virtue of a covenant in restraint by trade. It is common cause that although the respondent, as adumbrated hereinbefore, denied being in the employ of the applicant and furthermore specifically denied the existence of a written contract of employment, agreed to an order being granted in the following terms:-

“1. That the Respondent is restrained and interdicted from directly or indirectly conducting any business dealings related to the panel beating industry with the brokerages referred to by the Applicant in paragraph 20 of the affidavit of David Bernard Mandel until the 4th of May 2011 insofar as such business dealings are conducted within the magisterial district of Port Elizabeth.

That each party pay their own costs.

That the Applicant undertakes not to intercept or monitor “data” directed to the respondent in contravention of section 86 (1) of Act 25 of 2002 and not to cause same to be intercepted or monitored.

This order by consent settles all outstanding issues to date between the parties.”

- [3] On 3 September 2010 the applicant once more sought relief on an urgent basis for:-

“1. . . .

. . .

An order setting aside the Order granted by consent by this Honourable Court on the 17th of August 2010, in Case No 2270/2010;

An order restraining and interdicting the Respondent, for a period of (24) twenty four months, calculated from the 4th of June 2010, and within the Magisterial District of Port Elizabeth, either for her own benefit or for the benefit of any other person, from soliciting panel beating work for any person from:-

ABEX Brokers

AIG

Alexander Forbes

Asset Insurance Brokers
AON
Ballast Insurance Brokers
Bonnie Slabbert Brokers
Bouwer Collins
Breakaway Brokers
Brian Kemsley Brokers
Broadrisk Services
Brolink
David Rensburg
DHL Supply Chain
Fanie Du Preez Brokers
FCG
FNB Insurance Division
Glynis Baudin Brokers
Groch & Associates
Hannes Scheepers Brokers
Indwe
Leonie Hunt Brokers
Linette Jacobs Brokers
Maxifin
Meudene Steyn
Mutitt Insurance Brokers
Noel Harvey
PSG Consult
Robin van Rensburg
Scotrho Insurance Brokers
Skybound

Spectrum

Spectrum Brokers

St Francis Brokers

STB

Susan Brophy

Telesure / Auto & General

Walmer Insurance Brokers

Wener Vosloo Brokers

Zurich”

[4] In the founding affidavit, the deponent, David Bernard Mandel (Mandel) proffered an explanation as to the circumstances under which paragraph 1 of the previous order was limited to the twenty three entities referred to herein and attributed such limitation to an error on the part of his instructing attorney. In his supporting affidavit attorney Schoeman contended that the brokerages ought not to have been limited to the twenty three entities reflected therein but should have included a further seventeen entities as per the instructions which he had received from Mandel. As corroborative evidence, he annexed a copy of an e-mail received from Mandel’s professional assistant, Mrs. Elize Beattie (Beattie), which contained a list of some thirty one entities under the rubric Par 52.1.1/52.1.2. This e-mail, as I shall elaborate upon, was sent on Mandel’s instructions in response to matters highlighted by Schoeman in Mandel’s affidavit in draft form.

[5] In her opposing affidavit, the respondent refuted any notion that Mandel had instructed Schoeman as suggested and stated:-

“On these affidavits and documents filed herein, there was clearly never an instruction to the Applicant’s attorney to insert the firms listed as 1-17 in paragraph 6, into paragraph 20 of the affidavit filed in the Application under case number 2270/2010 and accordingly this particular aspect could have had no relevance /bearing on the settlement reached between the parties in the Application under case number 2270/2010”

[6] Schoeman’s affidavit, annexed to Mandel’s replying affidavit, affords conclusive proof that the omission of the further entities was entirely attributable to his fault. The draft affidavit which was forwarded to Mandel for his further instructions dispels any notion that Mandel had not instructed Schoeman as he alleged. In the draft paragraph 52.1.1 he solicited instructions from Mandel concerning “the brokers that we want to protect”. The response from Beattie in the e-mails sent to Schoeman reflected the names of the thirty one entities referred to hereinbefore. This refutes any suggestion that Mandel had instructed Schoeman to limit the entities to the twenty three reflected in paragraph 20 of his founding affidavit in the main application. It is not in issue that the relief sought in the main application was not

confined to specified brokers but widely stated to include “any broker who at any time has dealt with the applicant”. The clear wording of paragraph 20 suggests quite unequivocally that it was never intended to constitute a numerous clausus of entities in respect of which the restraint was sought. Paragraph 20 merely specified the brokers with whom the applicant had engendered close business relationships and nothing more.

- [7] The question which falls for determination therefore is whether Schoeman’s mistake, which the applicant contends amounts to just error, provides a legal basis for the setting aside of the court order dated 17 August 2010.
- [8] In argument before me counsel were in agreement that just error may in law constitute a basis for rescission of a judgment entered by consent and referred to the oft quoted dictum in *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others*¹ where Miller JA stated the following²:-

“It appears to me that a transactio is most closely equivalent to a consent judgment. (Cf. Cachlia's case, supra at p. 464.) Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. 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 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.” (emphasis added)

The judgment recognizes that an agreement of compromise may likewise be set aside on the ground of justus error. That the court order was the product of a compromise is self evident and in fact admitted by the respondent. The further question is whether the omission on the part of Schoeman to have included the names of all the entities advocated by Mandel was a reasonable mistake on his part. I accept Schoeman’s evidence relating to the omission and whilst his conduct amounted to an infraction of his duty vis-à-vis Mandel, such remissness ought not, in my view, to be visited upon the applicant. In my judgment therefore the compromise agreement was vitiated by the reasonable mistake on the part of Schoeman which warranted the setting aside of the court order.

- [8] A decision in favour of the applicant thereanent does not, as a corollary, justify the grant of the relief foreshadowed in paragraph 4 of the notice of motion, in the adjudication of which, the respondent must be afforded due process. These then constitute the reasons for the order which issued on 16 September 2010 which read:-

“1. That the order of court dated 17 August 2010 under case number 2270/10 be and is hereby set aside.

That the matter is postponed to 14 October 2010.

That pending the finalization of the matter the Respondent is interdicted and restrained from directly or indirectly conducting any business dealings with the panel beater brokerages referred to in paragraph 20 of the affidavit of David Bernard Mandel.

That the costs are to stand over.”

D. CHETTY

JUDGE OF THE HIGH COURT

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