**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

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|---|---|
| **Reportable:** | **YES/NO** |
| **Of Interest to other Judges:** | **YES/NO** |
| **Circulate to Magistrates:** | **YES/NO** |

Case number: A165/2019

In the matter between:

**P W** Appellant

and

**R W** 1st Respondent

**THE MASTER OF THE HIGH COURT, BLOEMFONTEIN** 2nd Respondent

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**HEARD ON:** **16 MARCH 2020**

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**CORAM :** NAIDOO, J , MBHELE, J et MATHEBULA, J

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**JUDGMENT BY:** MBHELE, J

**DELIVERED ON: 21 MAY 2020**

## INTRODUCTION AND BACKGROUND

[1] The appellant was an unsuccessful applicant in an interlocutory application, which served before a single judge of this division, where the following relief was sought:

> "1 That the admission by Applicant that first respondent (Plaintiff) is entitled to maintenance after death of the late G W, be withdrawn;
>
> 2 Leave to file an (amended) Plea, according to annexure "PMW2" attached to the affidavit.
> 3 That the first respondent be ordered to pay the costs of this application in case of opposing it, alternatively , that the costs of this application be the costs in the main action.
> 4 Further and / or alternative relief."

## COMMON CAUSE FACTS

[2] The appellant is the surviving spouse of the late Mr. G W (the deceased) and the executrix of the deceased estate.

[3] The first respondent was married to the deceased and their marriage was dissolved by way of divorce on 30 April 1996. The first respondent and the deceased signed a deed of settlement on

the date of divorce and it was made an order of court. Clause 1 of the deed of settlement reads as follows:

> "Dat die eiser aan die verweerderes betaal onderhoud in die bedrag van R1800, 00 per maand welke onderhoudsbetaling sal strek tot en met die dood of afsterwe van die verweerderes welke gebeurtenis ookal eerste mag plaasvind"

The parties are *ad idem* that 'dood of afsterwe' in the deed of settlement meant death or remarriage.

[4] The first respondent lodged a claim for maintenance against the deceased's estate in the form of a capitalised lump sum of R673 586.00 based on the actuarial report. The larger part of the claim is arrear maintenance.

[5] The appellant resisted the first respondent's claim in respect of the quantum.

[6] In her plea, the appellant admitted that the first respondent is entitled to maintenance after the death of the deceased but disputed the calculation thereof.

[7] After the pleadings were closed and pre-trial procedures in terms of Rule 37 of Uniform Rules were finalised, the appellant launched an application in the court a quo seeking the aforementioned relief. The application was prompted by a discovery that in terms of the findings in **Els v Jagga 2016 (6) SA 554 FB** an agreement to pay maintenance until death or remarriage of the receiving partner

terminates at the death of the paying partner, unless there are sufficient indications or express stipulations to the contrary.

[8] The application was dismissed and the appellant, aggrieved by the reasoning and the order of the court a quo, approached this court on appeal, with leave of the court a quo. The grounds for appeal are tabulated as follows in the notice of appeal:

1. The Court erred insofar as it finds that an admission can be withdrawn by way of an amendment of the pleadings.

2. The Court *a quo* therefore erred by not considering and applying the fact that an admission can only be withdrawn with the consent of the Court and not by way of an amendment.

3. The Court *a quo* erred by not finding that Applicant (Defendant) will be unduly prejudiced if the admission is not withdrawn since the case would then have to be conducted contrary to the decision of **Els v Jagga N.O. and Others 2016 (6) SA 554 FB**.

4.

4.1 The Court erred to rely on non-compliance with the rules of Court insofar as no Notice of Intention to Amend was filed prior to the application to withdraw the admission.

4.2 The Court erred by not taking into consideration that any amendment may be sought at any time and that it is only necessary to furnish the Court with an explanation why the admission was made and why it is sought to be withdrawn.

5. The Court erred by not finding that there is a proper explanation why the admission was made and *inter alia* not finding that the following is a plausible explanation.

5.1 That when the deceased passed away (Mr. W) the **Els v Jagga**-decision was not yet handed down; and

5.2 On the legal position before the **Els v Jagga**-decision, the advice to Applicant was correct; and

5.3 Applicant only after the pleadings were filed, became aware of the **Els v Jagga**-decision

6. In Conclusion, the Court erred by not finding that the admission is contrary to the legal position as set out in **Els v Jagga**.

7. The Court erred by not taking into consideration that First Respondent (as Plaintiff) can still amend her pleadings to allege and prove facts why the **Els v Jagga**-decision is not applicable.

8.

8.1 The Court also erred by finding that Applicant offered no explanation why she did not follow Rule 28. In paragraph 19 of her founding affidavit, Applicant states the following:

*"I have now been advised that it is not possible to amend my plea to withdraw the admission made without this Court approving it and that I should make this application to withdraw the admission made."*

She then states in paragraph 20 of her founding affidavit

*"I have therefore been advised not to give notice of my intention to amend in terms of Rule 28 of this Court since an admission cannot be undone simply by amending."*

8.2 The Court therefore erred by ignoring these specific allegations.

9. The Court *a quo* erred by finding that there is no basis to consider as to whether the interest of justice do exist or not. It is submitted that the interest of justice always prevails.

10. The Court also erred by not (sic) finding that the application is not properly before Court for non-compliance with the rules and stands to be dismissed.

[9] The court a quo dismissed the application on the basis that it did not comply with the provisions of Rule 28 of the Uniform Rules of this court.

[10] It is the appellant's case that the admission in her plea was made in error, contrary to the legal position in **Els v Jagga** *supra***.** The admission was as a result of the legal advice she received from her attorney.

[11] The appellant's legal representative only became aware of the legal position in **Jagga** long after her plea was filed. The appellant, based on the legal advice, tendered an amount of R177 750.00 to the first respondent which amount was rejected.

[12] The first respondent resists the appeal on the basis that:

- It involves a change of front which requires a full explanation to convince the court of the bona fides thereof; and
- It is more likely to prejudice the other party, who had by the admission been led to believe that he needs not prove the relevant fact and might , for that reason, have omitted to gather the necessary evidence;
- The appellant's application failed to deal with the consequences of the agreement reached during the Rule 37 conference.

[13] It is necessary to make an observation on the type of admission made by the appellant when considering the issue at hand. The admission made by the appellant that the first respondent's entitlement to maintenance persists beyond the deceased's death is a legal conclusion postulated by the first respondent in her particulars of claim. It is not an admission of fact.

[14] Where a plaintiff alleges in a pleading that a particular law governs the case, whereas that law may not, an admission by the defendant that the law referred to governs the case does not make it so. What a law is has always been a matter for the court to determine, and it is well established that mistakes about the law which the parties make are not binding on a court. See (**POTTERS MILL INVESTMENTS 14 (PTY) LTD v ABE SWERSKY & ASSOCIATES AND OTHERS 2016 (5) SA 202 (WCC)** at **page 205 par. 11**).

See also (PADDOCK **Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) 23F – G**) where the court remarked as follows:

> 'It would be an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part'.

[15] It is clear from the above dicta that the determination and endorsement of a legal position does not depend on agreements between the parties, it is a terrain to be traversed by a court. Admissions are not by themselves conclusive. The wrong admission of law made by the appellant would not become law that has to be endorsed by the court hearing the trial.

[16] The admissions of fact have to be approached differently from the admissions of law. Plaintiff does not need to prove facts admitted by the defendant. It is well established that questions of law do not need to be proven.

[17] The approach in determining whether a party should be permitted to withdraw a factual admission made at a Rule 37 conference is set out in **MEC v Kruizenga 2010 (4) SA 122 (SCA)** at **126 E to 127B**

> "The rule was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a rule 37 conference, constitute sufficient proof of those facts. The minutes of a pre-trial conference may be signed either by a party or his or her representative. Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference. And when, as in this case, the agreements are confirmed by counsel in open court, and are then made a judgment or order of a court, the principle applies with even more force.
>
> [7] It is settled law that a client's instruction to an attorney to sue or to defend a claim does not generally include the authority to settle or compromise a claim or defence without the client's approval. The rule has been applied to a judgment consented to by an attorney without his client's authority and also when the attorney did so in the mistaken belief that his client had authorised him to do so. This principle accords with the rule in the law of agency that where an agent exceeds the express or implied authority in transacting, the principal is not bound by the transaction."

[18] Although the appellant does not allege that the admissions were made without her knowledge, it is apposite to consider that the admission regarding the payment of maintenance after the deceased's death was an admission regarding the law, made following wrong legal advice obtained from her attorney. The

above dictum does not find application in the current matter, as it deals with the position regarding factual admissions.

[19] Our courts have over the years adopted an approach that an amendment will always be allowed unless the application to amend is *mala fides* or unless such an amendment would cause an injustice to the other side that cannot be ameliorated by a costs order. I have already mentioned that agreements based on what parties might have incorrectly presumed to be the law are not binding on a court. In my view, a party to a case will suffer no prejudice if the case is determined on the correct legal principles. The amendment sought by the appellant does not in any way alter the admitted facts.

[20] Having considered the context in which the admission was made I am of the view that the appellant should have been allowed to withdraw the admission. Consequently, the appeal ought to succeed.

[21] The appellant prayed for costs order only if the matter was opposed. There were attempts to save costs when an application was made to substitute Maree NO, the erstwhile first defendant, with the appellant. I am unable to find that the defendant was unreasonable in opposing this matter, and consequently should not be ordered to pay the costs of the appeal. In regard to the costs of the application in the court *a quo* I am of the view that the trial

court which will have a better understanding of issues and factual disputes will be better placed to adjudicate the question of costs.

[22] Consequently, the following order is made:

**ORDER**

1. The appeal is upheld.

2. The order of the court *a quo* is set aside.

3. The appellant is granted leave to withdraw the admission that first respondent (Plaintiff) is entitled to maintenance after death of the late G W.

4. The appellant is granted leave to amend her plea in accordance with annexure ‘PMW2’ to her founding affidavit.

5. The appellant is ordered to file her amended plea within 10 days from the date of this order;

6. The first respondent is granted leave to make any consequential amendments to the pleadings and documents she has filed, within 10 days of the filing of the amended plea.

7. The costs of the application in the court *a quo* shall stand over for adjudication by the trial court.

8. Each party to pay her own costs of appeal

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**N.M MBHELE.J**

I concur

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**NAIDOO.J**

I concur

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**MATHEBULA.J**

On behalf of appellant: Adv Heyns
Instructed by:
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On behalf of respondents: Adv. Van Aswegen
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