REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **384918/2015**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

Road Accident Fund **Applicant**

And

Zulu, Joseph **First Respondent**
S. S. Ntshangase Attorneys **Second Respondent**

Judgment

Van der Linde, J:

[1] This is an application by the Road Accident Fund under High Court Rule 42(1)(c) for the rescission of a judgment granted *"… as the result of a mistake common to the parties."* The judgment was granted on 21 August 2015 by the Deputy Judge President, as part of the trial

roll call, when he was informed by counsel for the plaintiff, the present first respondent, and counsel for the defendant, the present applicant, that the mater had been settled. They handed up a draft order, and the DJP made it an order of court. It included an amount of R380 000 for general damages and both past and future loss of earnings.

[2] Counsel who acted for the applicant then, also acted for the applicant in this application. He adumbrated from the Bar what the founding affidavit asserted had happened. The common error relied upon by the applicant in the present application, was the following. The first respondent had sued the applicant under the statutory claim for damages following on injuries sustained arising out of the driving of a motor vehicle on 22 October 2010.

[3] The error is said to have come about while the settlement was negotiated. Counsel for the applicant obtained a mandate that morning to settle general damages for R200 000. He conveyed that to his counterpart, who accepted it.

[4] His attorney that went away and obtained a further mandate for loss of earnings. He reverted and conveyed an amount to applicant's counsel the amount which, according to the applicant's attorney, was some R20 466; but was erroneously understood by applicant's counsel to be R204 466. Applicant's counsel then proposed to his counterpart that loss of earnings be settled at R180 000, and so that the globular amount in respect of damages would come to R380 000. The defendant, now first respondent, accepted this, according to the applicant's version.

[5] This amount, together with an appropriate certificate in respect of future medical expenses, was then conveyed to the DJP in the form of a typewritten draft order, and the judgment was made by consent and so announced in court. Some days later the applicant appreciated that an error had occurred in conveying the mandate to the first respondent, and in due course, after some delay, launched the present application.

[6] In the answering affidavit the respondents argued that condonation for the delay in the bringing of the application was required but should not be granted. They also disputed

squarely the contention that there was any error on the part of the applicant; and they certainly denied that there was any error on their part.

[7] Their version is very different from that of the applicant. They say that at all times the R380 000 was offered as an all-in settlement; there was no talk of first offering R200 000, and then later offering R180 000. No replying affidavit was filed, and there was at no stage an application by the applicant to refer the disputes to evidence or trial.

[8] It does not seem to me that there is merit in the attack on the application having been brought late. The application is expressly brought under rule 42, and it has no express time limit.

[9] Concerning the merits, however, there is objective support for the respondent's version. The actuary, Mr Jacobson,[1] calculated the total loss of earnings on two bases. On basis A, the loss was R20 466;[2] on basis B, the loss was R178 453.[3] This latter calculation was arrived at on the assumption that the first respondent, but for his injuries, would have continued working till age 70. The former amount was on the basis that the respondent would have worked only to age 65. The basis A assumption was made by Mr Jacobson the basis of the opinion, which he recorded in his report,[4] expressed by an expert, Dr Sugreen, whose report was not included in the papers.

[10] The amount of R178 453 referred to in Mr Jacobson's basis B comes close to the amount of R180 000 which on the applicant's version was offered to the first respondent's counsel by the applicant's counsel. Although the respondents' version is very different, the R180 000 adds up with the R200 000 also mentioned by the applicant, to arrive at R380 000, the all-in amount to which the respondents refer.

[11] So it is entirely possible that the components of R200 000 and R180 000 were calculated on the applicant's side; but the point is that it shows that, whatever version one accepts, the

[1] His report is at p27 ff.
[2] P29.
[3] P30.
[4] At the top of p28.

applicant had conveyed to the respondent an offer which had provided for about R180 000 for loss of earnings.

[12]During argument counsel for the applicant was asked whether the applicant contended that the respondent was party to, or even aware of, the mistake on which the applicant relied for the relief it was claiming in the application. Counsel responded that no such case was asserted or could be asserted, as the respondent was illiterate, and probably did not even know what Mr Jacobson had concluded. Also, no argument was advanced by the applicant as to why it should be regarded that the error which admittedly was unilaterally made, was *justus* or reasonable.

[13]In these circumstances there are two insurmountable problems in the way of the application succeeding. The first is that the applicant cannot, on these papers, show *"a mistake common to the parties."* The participation by the respondent in such a mistake is absolutely lacking, even on the applicant's own version. The second is that on the respondent's version, there was in truth no mistake at all, not even on the part of the applicant. And the respondent's version must be accepted, absent a referral to either evidence or trial.

[14] In the result the application must fail, and I make the following order:

The application is dismissed with costs.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 6 May, 2016
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