**IN THE HIGH COURT OF SWAZILAND**
Held at Mbabane

Civil Case No: 574/2010

In the matter between:

**Caiphas S. Mbingo**
Applicant

And

**Motor Vehicle Accidents Fund**
Respondent

| | |
|---|---|
| Coram | Hlophe J. |
| For the Applicant | Mr. A. Lukhele |
| For the Respondent | Mr. S. Masuku |

**JUDGMENT**

HLOPHE J

[1] Sometime in December 2002, the Applicant herein launched a claim against the Respondent in terms of which he sought compensation *inter alia* for the loss of support and future loss of support as a result of the death of the Applicants wife, who was a breadwinner, brought about by an accident involving a certain

motor vehicle bearing Registration plates R. Power GP. The said motor vehicle was driven by one Richard Power.

[2] The Applicant's claim was both for loss of support and future loss of support both for himself and that of their minor child with the deceased, called Yandile Mbingo.

[3] Respondent's duty to compensate Applicant arose from the statutory duty imposed on the Respondent by the Motor Vehicle Accident Fund Act, which in law tasked the Respondent with compensating victims of motor vehicle accidents or the dependants of such victims in the event such victims have died.

[4] The parties eventually agreed to settle the claim by means of a compromise or a settlement agreement. The terms of the said agreement were written and contained in a document spelling out same and signed on the 16th June 2004. by and on behalf of the parties.

[5] There were in actual fact two such compromise contracts or settlement agreements which were annexed to the pleadings, with one covering the Applicant's personal claim whilst the other one covered that by the minor child the Applicant acted on behalf of as well.

[6] The salient terms of these compromise contracts or settlement agreements stated as follows:-

6.1 For the Applicant Personally:-

(a) That the Applicant in his personal claim was to be paid a total sum of E306 461.50.

(b) Of the said amount, a sum of E21 208.50 was to be payable in cash for loss of support from date of death to the settlement date.

(c) The balance in the sum of E285 253.00 was for future loss of support payable in yearly instalments of E10 000.00, with the last year's instalment being a sum of E15 253.00. The last year agreed upon is 2032.

6.2 For the minor Child- Yandile Mbingo

(a) That the aforesaid child was to be paid a total sum of E388 988.00.

(b) Of the said sum, E51 260.00 was to be paid to the said child through the Applicant in cash for loss of support from date of death of the said minor child's mother to the date of settlement.

(c) The balance in the sum of E337 728.00 was to be paid in annual instalments of E21 108.00 with the last year of such payment being the year 2020. (Probably that is the year she would attain majority status).

[7] The conditions attaching to the settlement were set out in each particular case as follows:-

7.1 As against the Applicant:-

(a) The fund undertook to pay the sums aforesaid by way of annual instalments as set out above.

(b) The First payment was to be made by the 7th January 2005.

(c) Thereafter annual instalments were to be made by the 10th January of each succeeding year;

(d) The payments (sic) is payable until all the minors affected shall have attained the age of majority,

(e) Payment is conditional upon the minors, being alive upon each instalment becoming due;

(f) In the event of any minors failing to attain the age of majority, the remainder of the amounts provided for and any interest accrued thereon shall accrue and revert to the Fund.

7.2. The same foregoing conditions also applied verbatim in the case of the minor child on whose behalf the Applicant also instituted the current proceedings.

7.3. After alleging that the amounts were to be paid in full and final settlement of all claims present, future, potential, contingent and prospective arising in connection with any loss or damage caused or indirectly caused by the Motor Vehicle accident forming the subject matter of the claim, there were stated other conditions and of significance was, in my view, the following which, I shall quote in full and verbatim :-

> "*I agree and accept that this statement is fully binding on the claimant and the claimant's successors in title and that under no circumstances whatsoever, either at the claimant's instance, or on the claimant's behalf, or on behalf of any other person shall the said settlement be set aside.*"

**7.4** *Another term stated the following:-*

*"I further accept that no alteration, cancellation, deletion or variation of this document shall be of any force or effect whatsoever, unless subscribed to in writing by both parties."*

[8] The Deeds of Settlement or letters of Settlement (the compromise agreements) have no clause giving the Respondent the power to cancel or set aside the compromise for any reason and in particular, upon discovery that the Applicant was now receiving income from any other source or even that he had since remarried. In my view if these were viewed as conditions, then they had to be expressly stated therein, particularly if their breach was meant to have such a prejudicial effect on the Applicants.

[9] Notwithstanding the provision of the aforesaid settlement letters or compromise referred to above, the Respondent only paid the amounts agreed in both instances for a much shorter period than as agreed; for instance for the periods 2005 -2007 as regards the Applicant whilst for the years 2005 -2009 it paid the minor child. The Respondent thereafter refused to pay any further amounts beyond the dates set out above in each case. This

necessitated that the Applicant approaches this Court for an order compelling Respondent to pay the amounts agreed upon in terms of the settlement agreements or compromise referred to.

[10] In its opposition to the application, the Respondent, through the affidavit of Helmon Mfana Vilakati, did not deny the existence of the compromise and how it came into being.

[11] It was contended further by the Respondent, that the Applicant had not disclosed prior to the conclusion of the agreement that he had since remarried someone who was earning some income in 2003 and also that he was himself employed and earning some income from a certain church in Manzini. Owing to these incidents of alleged non-disclosure, it was contended by the Respondent that it had decided to stop the payments of the sums agreed to in terms of the compromise referred to above, which were stopped on the dates alleged by the Applicant as stated above.

[12] The Respondent further contended that it was going to ask for an order setting aside such settlement agreements on the basis of the Applicant's alleged non-disclosure. The Respondent further claimed that it had initially settled the claim based on the information supplied by the Applicant which according to it turned out not to be full disclosure.

[13] The duty to disclose, so the Respondent contended, emanated from the questions paused in the claim form, particularly in terms of paragraphs 8 (J) and (K). Paragraph 8 (J) of the claim form required the claimant to state the name and address of his employer at date of accident and for how long he had been so employed. On the other hand paragraph 8 (K) required the Applicant to state his income of the 12 months immediately preceding the accident coming both from his employment and from any other source.

[14] It is my observation from the claim form annexed to the application that although the said paragraphs required such information from the Applicant, he did not fill in any information in

response thereto but left them blank. The Settlement of the matter was therefore reached without any such information or any answer in whatever form, having been supplied. I can therefore conclude that the Respondent was not influenced by any disclosure made by the Applicant in this regard to come to the decision it did. I cannot even say he was influenced by the non-disclosure for I do not understand the basis of his justification to construe that the failure to provide an answer by the Applicant to simply mean that the latter was not earning an income. I agree if such information was necessary in the Respondent's consideration, the latter should have insisted on such information being supplied rather than it unjustifiably construing it so as to mean what it says it did. It is only then that in my view it would have been able to decide if there was any fraudulent disclosure or nondisclosure.

[15] The Respondent said this about the agreements reached with the Applicant at paragraphs 2.4 and 2.5 of the affidavit of Helmon Mfana Vilakati:-

*"2.4 that on the merits of the accident, the Respondent, without admitting liability and on a purely without prejudice basis offered to settle the claim out of Court by entering into an agreement of settlement to pay loss of support for the Applicants, the terms of which were to be paid in annual instalments as reflected in annexwe "A" of the founding affidavit."*

*"2.5 The Respondent in the same fashion as in 2.4 above agreed to settle the loss of support and future loss of support claim for the minor child."*

[16] The Respondent contends further that it was around 2008, when it discovered that the Applicant failed to disclose that he actually had a monthly income in the form of a salary the latter earned from a church called Salvation and Praise Ministries where he was a Pastor as well as that he had remarried to an employee of Tisuka TakaNgwane who earned a sum of E13 000.00 per month.

[17] I have noted that at paragraphs 2.4, 3 and 6 of the answering affidavit attested to by the said Helmon Mfana Vilakati the Respondent admits that the agreement reached between it

and the Applicant, which brought about the finalization of the matter, was a settlement agreement or a compromise agreement.

[18] Having concluded the settlement or compromise agreement with the Applicant was it open to the Respondent to refuse to act in terms thereof on the contention that the Applicant had not disclosed in the initial claim that he was getting an income and that he had remarried someone gainfully employed? This is the question I have to answer in this matter.

[19] I have already indicated that on the facts of the matter it is difficult if not impossible to conclude that the omission of his income in August 2002 by the Applicant was for an improper purpose. This is because notwithstanding such information not having been disclosed, in fact it having been omitted, the Respondent went on to entertain the application without same. In fact if the Respondent came to the conclusion that the matter be settled because the non-disclosure of such particular information to it meant that the Applicant had no income, then there was no

basis for it to so conclude in my view. The reality is that if Respondent felt that such information was crucial, it did not have to assume the answer from the non-supply of such crucial information but it had to insist on such information being supplied. I therefore cannot find that the failure to disclose such information was a misrepresentation or that same was fraudulent. I say this because I am of the firm view that if the non-disclosure was fraudulent, then the position would be completely different from the one to which I have eventually come.

[20] Describing a compromise, LTC Harms in his book titled "Amler's Precedents of Pleadings, Sixth Edition, Lexis Nexis Butterworths Page 84, puts the position as follows :-

> "*A compromise or settlement (transactio) is a contract the purpose of which is to prevent or put an end to litigation whether embodied in an order of Court or not, it has the effect of res judicata ... It is, therefore, an absolute defence to an action based on the original claim.*"

[21] At page 85 of his above stated book LTC Harms states the following:-

> "*A compromise is a substantive contract which exists independently of the cause that gave rise to the compromise. Being a contract the general rules of pleading a contract apply.*"

[22] Unlike in the case of novation, where the parties replace one valid contract with another one, such that if the original contract is subsequently shown to be invalid, the novated one will also be of no force or effect; a contract of compromise is not affected by the invalidity of the original obligation.

[23] In **Dennis Peters Investments (Pty) Ltd vs Ollerenshow 1977 (1) SA 197 (W),** the defendant was sued on an acknowledgment of debt arrived at as a means to settle the initial litigation between the parties. In defending itself from the new claim, the defendant alleged that the Plaintiff was not entitled to the amounts therein claimed because they were in effect money lending transactions which had to be examined in terms of the Act governing such transactions. This was in fact a contention

that the amounts claimed in terms of the acknowledgment were actually made of interest violating the usury Act in South Africa. The defence was therefore a challenge of the amounts contained in the acknowledgment of debt. This defence could not be upheld on the grounds that the settlement resulting in the acknowledgment of debt was a compromise which had the effect of *Res Judicata* in the initial matter. Furthermore the amounts claimed were not in terms of the money lending Act this time around but were now in terms of the compromise.

[24] Reverting to the matter at hand, there is no doubt that a compromise was reached and that its effect was to bring the claim resulting in it (the compromise) to an end such that, that is that matter now *res judicata.* It is therefore not open to the Respondent to revisit the initial cause of action for the compromise agreement becomes a cause of action or put differently, an end in itself. It does not matter whether the Applicants initial claim was valid or not; as the cause of action is

now the compromise which if reached its terms become enforceable.

[25] The Respondent could only avoid the consequences of a compromise if a right to proceed on the original cause of action had been reserved in my view. In the present matter, the Respondent had not put any condition that reserved its right to raise the initial cause of action so as to now seek to rely on a failure by the Applicant to disclose any information in the initial claim form. See in this regard **Van Zyl vs Niemann 1964 (4) SA 661 (A),** where it was stated that the parties are not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise.

[26] Although the law does contemplate defences to a compromise which include fraud or mistake where such mistake vitiated the true consent and did not merely relate to the motive of the parties, there is no basis for so contending in this matter and the Respondent has not so alleged. See **Rowe v Rowe 1997 (4) SA 160 (SCA)** on the fraud as a defence to a compromise

and **Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co. (Pty) Ltd 1978 (1) SA 914 (A)** on the mistake as a defence to a compromise.

[27] I am convinced that none of the cognisable defences to a compromise have been alleged or even proved by the Respondent.

[28] Consequently the Applicant's application has to succeed and I make the following orders.

28.1. The Respondent be and is hereby directed to forthwith make payments of the sum of E10 000.00 per year to the Applicant, for the years 2008 to 2011 and thereafter the sum of E10 000.00 per year from 2012 to 2031 which is to be made payable by the dates agreed upon in terms of the compromise contract.

28.2. The Respondent be and is hereby ordered to pay Applicant the sum of E15 253.00 in the year 2032.

28.3. The Respondent be and is hereby directed to pay Applicant on behalf of the minor child, Yandile Mbingo, the sum of E21 108.00 per year for the years 2009 to 2011 and thereafter to pay the Applicant on behalf of the said minor child the same amount yearly on the date agreed upon in the compromise contract until the year 2020.

28.4. The Respondent be and is hereby ordered to pay the costs of this application.

**Delivered in open Court on this 24th day of June 2011.**

N. J. Hlophe