CASE NO.: I 3299/07

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MBAMBUS ELIZABETH **APPLICANT**

and

THE MOTOR VEHICLE ACIDENT FUND **RESPONDENT**

Coram: Ndauendapo, J

Heard on: 19 February 2008

Delivered on: 4 October 2010

JUDGMENT:

NDAUENDAPO, J: [1] This is an application for summary judgment. On 24 February 2005, the applicant's husband was killed in a motor vehicle collision

which occurred on the western bypass, Windhoek. The applicant in her capacity as the wife of the deceased as well as in her capacity as the mother (guardian) of the three (3) minor children, instituted a claim against the Respondent (The Motor Vehicle Accident Fund) for loss of support and funeral expenses.

[2] During January 2006 a settlement agreement was signed between the Applicant and the Respondent. In terms of the settlement agreement the Respondent undertook to pay a total amount of N$72 555.91 for past loss of support to the Applicant and the three (3) minor children and for funeral expenses. The said amount was duly paid to the Applicant.

[3] **Clause 3** of the settlement agreement provided (inter alia) as follows:

“Undertaking”

The parties have agreed that upon conclusion of this written agreement, the fund will be liable in respect of the following undertaking, which is furnished in terms of Section 10(5)(a) of the Motor Vehicle Accident Fund Act.

Future loss of support

The fund will pay the loss of support, for the year December 2006 – referred to as “year 1” to the following person: Name: Elizabeth Mbambus on behalf of herself, and

Elizabeth Mbambus	amount N$31 154,84
Ndeya A. Mbambus	amount N$15 577,49
Ezek N. Mbambus	amount N$15 577,49
Lean N. Mbambus	amount N$15 577,49

The fund further undertakes to thereafter pay Los of Support to these victims annually until:

- "Ndeya Mbambus, Ezer N. Mbambus, Lea N.N. Mbambus, be comes self-supporting, attains the age of majority (21 years), dies, or the total amount paid is N$100, 000.00 whichever event occurs first.
- Elizabeth Mbambus reaches the age of 60 or dies or the total amount paid is N$100,000.00 whichever occurs first"

[4] **Clause 4** of the agreement provided as follows:

> *"The parties have now agreed that the settlement, and the fund's performance in terms of that settlement, constitutes the* ***full and final settlement*** *of all and any claims of whatever nature, present or future, whether for capital or costs, whether for future or unascertained damages, that the claimant may now or hereafter have against the fund in law, which arise out of the accident stipulated in the MVAF1 claim form submitted by the claimant to the fund."*

[5] Subsequent to the settlement agreement, the (Respondent) informed the Applicant that it will not pay her the future loss of support because it made a mistake by accepting liability and paying out her claim because the fund obtained legal opinion to the effect that "in terms of the Motor Vehicle Accident fund Act 2001, the fund cannot pay a claim submitted by a dependent of a deceased person if the deceased was killed in a motor vehicle accident, caused by himself or herself."

[6] Dissatisfied with the new position taken by the Respondent, the applicant issued summons against the Respondent. The particulars of claim, *inter alia*, allege the following:

> "3. On or about 24 January 2006, and at Windhoek the parties entered in a written agreement in terms whereof the Defendant was under obligation to:
>
> 3.1 Pay the plaintiff an amount of N$72 539-91 upon conclusion of the agreement;
>
> 3.2 Pay to the plaintiff for herself and on behalf of the minor children referred to hereinabove as a guardian during December 2006 amount of N$31 154-84 for the plaintiff, an amount of N$15 577-49 for the minor child Ndeya A. Mbambus, an amount of N$15 577-49 for the minor child

Ezer N. Mbambus and an (*sic*) amount of N$15 577-49 for the minor child Lea N.N. Mbambus.

4. Pursuant to the conclusion of the aforesaid agreement defendant paid the first combined amount of N$72 55191as provided for in the agreement under clause 2 upon conclusion of the agreement.

5. The defendant has breached the agreement between the parties when it failed and/or refused to pay the amounts referred to herein *supra* under paragraph 3.2 during December 2006. Subsequent to the aforementioned breach during December 2006 the defendant further repudiated its obligations by unlawfully and unilaterally purporting to cancel the agreement.

6. In the premises the defendant is in breach of the terms of the agreement and has repudiated its obligation as provided for in the agreement.

7. The defendant is in the premises liable to pay the plaintiff a combined amount of N$77 887-31 to the plaintiff which amounts the defendant has failed to pay despite demand."

[7] The defendant filed a notice of intention to defend and the Applicant (Plaintiff) filed an application for summary judgment on the grounds that the Respondent does not have a *bona fide* defence and had given the aforesaid notice solely for the purpose of delay. To resist the summary judgment/application the Respondent filed an opposing affidavit setting out the basis of its defence. The "supporting affidavit" (which should be opposing affidavit) was deposed to by Inonqe Mainga who claims to be an "adult person" employed by the Motor Vehicle Accident fund of Namibia. In paragraph 2.1 of the affidavit she says:

"duly authorised and able to depose to this affidavit on behalf of the Defendant/Respondent and that the facts stated in this affidavit are within my personal knowledge, unless stated otherwise and that the facts stated herein are both true and accurate." As to the grounds of defence, she states:

Grounds of defence:

"3.1 I deny that the Defendant does not have a *bona fide* defence to the plaintiff's claim and that the Defendant has entered notice of intention to defend solely for the purpose of delaying the plaintiff's claim.

3.2 I submit that the Defendant has a *bona fide* defence to the plaintiff's claim. The Defendant's defence is based on the following:

3.2.1 The Defendant is a creature of statute and only has the powers and authority conferred on it by the creative deed.

3.2.2 The creative deed (i.e. the Motor Vehicle Accidents Fund Act 2001, provides in section 10 the basis of liability by the fund.

3.2.3 Section 10(1) as read with section 10(4) of the Motor Vehicle Accident's Act, 2001 precludes the fund (the Defendant) from paying any compensation to a person who suffered damages if the damages were caused by his or her own negligence.

3.3 I have indicated in paragraph 2.2 of this affidavit that the accident was due to the negligent/unlawful driving of the deceased, Fillemon Mbambus. The deceased Fillemon Mbambus was driving in the lane of the oncoming traffic and collided head on with a truck driven by a certain Mr. Jacobus.

3.4 Since the Act precludes the fund (Defendant) from paying any compensation to a person who suffered damages if the damages were caused by his or her own negligence it thus follows that the agreement concluded by the Defendant and the plaintiff is void *ab initio* and no legal consequence can flow from a contract which is void *ab initio*.

4.1 I have in paragraphs 2 & 3 set out the grounds of Defendant's defence to the plaintiff's claim and I submit that the grounds of defence clearly disclose that there is a prima facie case or the existence of an issue which is fit for trial."

[8] Mr. Namandje appeared on behalf of the applicant and Mr. Ueitele on behalf of the respondent. Both counsel submitted written heads of argument.

[9] Mr. Namandje referred to the covering letter to the settlement offer by the respondent to the applicant dated 19 December 2005 which stated that:

> *"When the fund receives a signed agreement from you, one of the fund's managers will review all aspects of the claim, including the evidence and documentation submitted by you. If everything is found to be in order, the fund will also sign this agreement whereupon your claim will be settled.."*

[10] He further submitted that the settlement agreement signed on 26 January 2006 between the parties was in full and final settlement of all and any claim of any nature present or future.

[11] He further submitted that the applicant's case is brought on an account of breach of contract between the parties and has nothing to do with the provisions of the Motor Vehicle Accident Act.

[12] He further submitted that respondent's attempt to rely on a mistake (when it entered into the settlement agreement) should be rejected on the basis that any party in our law that attempts to escape liability from the contractual obligations should not only prove that the mistake is (justus) reasonable but also that it was not due to misrepresentation by the other party to the agreement. He referred this Court to the matter of ***National and overseas Distributors Corporation (Pty) Ltd v potato Board 1958 (2) SA 473 (A)*** *(at 479G)* where the court held that:

> *"Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance under misapprehension, the scope of the defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus and it would have to be pleaded. In the present case the plea makes no mention of mistakes and there is no basis in the evidence of the contention that the mistake was reasonable."*

He further submitted that the respondent's "allegation fall short of making out a case both in law and facts, as to why it should escape liability on the basis of mistake. If there was indeed a mistake, the full nature and circumstances thereof are not sufficiently detailed as required in law of contract."

[13] Mr. Namandje omitted to quote the further passage, which does not support his submission and I quote:

> *"So that if the respondent had been a natural person who had made some such mistake as that attributed to Mr. Rust there would have been no defence to the action. But it was argued that the respondent was in a more favourable position because it was a corporation whose Board's resolution had not been properly carried out by the manager. But in the first place it is to be observed that no question of ultra vires arises. The Board has power under the scheme which is its constitution to acquire property and it was within its power to enter into the contract which the appellant claims that it did enter into." (My emphasis) (See National and Overseas Distributors supra at 479 – 480H)*

[14] The above matter is clearly distinguishable from this one. The Respondent in this matter is a creature of statute and the question of *ultra vires* clearly arises. The Respondent which is a creature of statute can only act within the power conferred on it by the creative deed. And in terms of section 10(1) read with 10(4) of Act 2001 it is not liable to pay dependants where the deceased caused his own death. Mr. Ueitele submitted that the argument that the respondent cannot rely on its mistake is tantamount to evoking the principle of estoppel. He referred to *Baxter Administrative Law (Juta)* 1984 at 401 where the learned author said the following: "Public authority could never acquire lawful powers through the operation of estoppels because to allow this would undermine the principle of legality. To allow a public authority to hold out incorrectly that it is

empowered to act in a certain manner would permit it to arrogate powers to itself which it does not possess."

The Law

Rule 32 (3)(a) and (b)of the High Court Rules provides that: "(3) Upon the hearing of an application for the summary judgment, the Defendant - may

(a) Give security to the Plaintiff to the satisfaction of the registrar for any judgment including costs which may be given; or

(b) satisfy the Court by affidavit (which shall be delivered before noon on the Court day but not preceding the day on which the application is to be heard) or with the leave of the Court by oral evidence of himself and or herself or of any other person who can swear positively to the fact that he or she has a bona fide defence to the action, and such affidavit

or evidence, shall disclose fully the nature and grounds of the defence and the material facts relied upon therefore."

[15] Mr Namandje submitted that the Respondent's affidavit has,

"both in law and facts failed to meet the requirements set out in Rule 32. He referred this Court to the matter of ***Mahara vs Barclays National Bank Ltd 1976 (1) SA 418 (A)*** where the Court (at 426) stated that:

> *"that while the defendant needs not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material fact upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defense."*

He also referred this Court to the matter of ***Gilinsky and another vs Superb Launderers and Dry Cleaners (Pty) Ltd 1978 (3) SA 807*** where the Court (at 810 A) stated that:

> *"it follows therefore that if the allegations in the Defendant's affidavit are equivocal or incomplete or open to conjecture then the requirements of the Rule in question have not been complied with"*

He further argued that the Respondent's affidavit

> *"does not only have to disclose a bona fide defense and fact relied on but it is important that the defense should be a defense capable of being raised to the action brought by Applicant as set out in the particulars of claim."*

[16] Rule 32(3) has been considered by a list of cases in both our Courts and elsewhere.

[17] In the matter of ***Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd*** 1998 NR 198 at p 201 C-F Strydom JP (as he then was) said the following:

> "There can be no doubt that summary judgment is an extraordinary remedy, which does result in a final judgment against a party without affording that party the opportunity to be heard at a trial. For this reason Courts have required strict compliance with the rules ***and only granted summary judgments in instances where the applicant's claim is unanswerable*****"** (my emphasis)

[18] In the case of ***Commercial Bank of Namibia Ltd v Transcontinental Trading*** 1991 NR 135 (at 143 E-I,) Hannah AJ. (as he then was) stated that:

> *"First it is necessary to consider what it is that a respondent to an application for summary judgment has to do in order to successfully resist such an application. In terms of Rule 32 (3) he may either give security to the plaintiff for any judgment which may be given or satisfy the Court by affidavit that he has a bona fide defence to the action, and such affidavit shall disclose fully the nature and grounds of the defence and the material facts relied upon therefore". Where the defence is based on facts averred by the defendant the Court is not concerned with determining whether or not there is a balance of probabilities in favour of the one party or the other."*

As was said by Corbett JA in ***Maharaj v Barclays National Bank Ltd*** 1976 (1) SA 418 (A) at 426B:

> *"All that the Court enquires into is: (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law.* ***If satisfied on these matters the Court must refuse summary judgment, whether wholly or in part of the claim.*** *The word "fully", as used in the context of Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with facts and evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit disclose a bona fide defence".*

[19] Teek J, in the case of ***Namibia Petroleum (Pty) Ltd v Vermaak*** 1998 NR 155 at page in F-J took the matter further and said the following:

> *"At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required as of a plea; nor does the Court examine it by the standard of pleadings".*

> *"The word "fully" requires that sufficient detail of the nature and grounds of the defence must be disclosed in order to enable the Court to consider whether or not a bona fide defence- or "...whether the defence is a good one and is honestly made".* ***Herb Dyers (Pty) Ltd v Mohamed and Another*** *1965 (1) SA 31 (T). In*

order to determine whether the defence raised by the respondent constitutes a good defence in law and whether it appears to be bona fide the Court must be fully appraised of the material facts upon which defendant relies with sufficient particularity and completeness as to enable the Court to hold that if the statements in fact are found to be correct, judgment should be given for respondent. ***Maharaj v Barclays National Bank Ltd*** *1976 (1) SA 418 (a) AT 426,* ***Breytenbach v Fiat A (Edms) Bpk*** *1976 (2) SA 226 (T) at 3421A. The defence must therefore not be averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy".*

[20] In the case of ***Kramp v Rostami*** 1998 NR 79, at page 82 C-I Teek J. said:

"The test in an application of this nature is for the respondent to set out a bona fide defence in his answering affidavit. There is no onus on him apart from setting out the facts which in the absence of a trial would satisfy the Court that he has a bona fide defence in order to entitle the Court to decline Applicant's application for summary judgment. I shall now proceed to deal with respondent's defence on the merits to determine whether or not it is a bona fide one. The approach of the Court in this regard is clear. The Courts have over a number of years formulated what is required of defendant in order that his affidavit may comply with the terms of this rule. The defendant must satisfy the Court that he has a defence which, if proved, would constitute an answer to the claim and that he is advancing it honestly. The latter portion of the Rule sets out what must be stated in an affidavit to put the Court into a position to satisfy itself whether or not a bona fide defence has been disclosed. It requires the affidavit to state (a) the

nature, and (b) the grounds of the defence and (c) the material facts relied upon to establish such a defence and these requirements must be stated "fully". It follows, therefore, that if the allegations in the defendant's affidavit relative to these factors are equivocal or incomplete or open to conjecture then the requirements of the rule in question have not been complied with". ***Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd*** *1978 (3) SA 801 (C) at 809H-810A.*

The word "fully" mentioned in the Rules is not meant to be given its literal meaning and it is sufficient for the respondent to set out facts so as to persuade the Court that it has a bona fide defence to the claim. But if the defence – is averred in a manner which appear in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides – and grand the application sought."

Is the Applicant's claim unanswerable?

[21] As indicated earlier, the Respondent stated its defence in the opposing affidavit as follows:

a) It is a creature of statute and only has the powers and authority conferred on it by the creative deed.
b) The creative deed (The Motor Vehicle Accident Fund Act 2001, Section10 (1) as read with Section 10(4) of the Act, 2001 precludes the fund from paying any compensation to a person who suffered damages if the damages were caused by his or her own negligence.

[22] The Respondent further alleges that “the death of the deceased was caused by his own negligence as (Fillemon Mbambus), as he was driving in the lane of the oncoming traffic and collided head on with a truck driven by a certain Mr L. Jacobus. It thus follows that the settlement agreement concluded between the Applicant and Respondent was void *ab initio* and no legal consequences can flow from a contract which is void *ab initio*.”

In **skeleton coast Safari Pty Ltd v Namibia Tender Board and Others 1993 NR** 288 Hannah J (at 299-300 J). Stated that: “In this circumstances the only conclusion that can be arrived at is that the first Respondent purported to exercise a power which it did not have. It acted *ultra vires.”* Similarly *in casu*, the Respondent can only exercise a power conferred on it by the creative deed i.e The Motor Vehicle Accident Fund Act 2001 and as indicated above Sections 10(1) as read with Section 10(4) of Act 2001 preclude the respondent from paying compensation to a person who suffered damages if the damages were caused by his or her own negligence. As Hoexter (administrative law in South Africa 2007 at 227) observed:

> “every incident of public power must be inferred from a lawful empowering source, usually legislation. The logical concomitant of this is that an action performed without lawful authority is illegal or *ultra vires* – that is to say beyond the powers of the administrator.

[23] Mr Ueitele submitted that the Defendant is a public authority and it exercises its power for the public benefit. It thus follows that when the Defendant exercises its powers under the Motor Vehicle Accident Fund Act, 2001 including the signing of an agreement

to compensate the Plaintiff, it is performing an administrative act and that administrative act must comply with all the requirements of legality. I agree with that submission.

THE ORDER

In conclusion, I am satisfied that the Respondent has set out a *bona fide* defence which is good in law to the Applicant's claim.

In the result, the application for summary judgment is dismissed with costs.

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NDAUENDAPO, J

ON BEHALF OF PLAINTIFF:

On instructions of: Sisa Namandje & Co. Inc.

ON BEHALF OF DEFENDANT:

On instructions of: