REPUBLIC OF NAMIBIA NOT / REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case no: A 312/2012

In the matter between:

1.1.1.1. **WERNER WUNDERATZKE**
APPLICANT

and

MOTOR VEHICLE ACCIDENT FUND
OF NAMIBIA **1st RESPONDENT**
SAKEUS AKWEENDA **2nd RESPONDENT**

Neutral Citation: *Wunderatzke v The Motor Vehicle Accident Fund of Namibia (A 312/2013) [2013] NAHCMD 295 (18 October 2013)*

Coram: SMUTS, J
Heard: 9 October 2013
Delivered: 18 October 2013

Flynote: In settlement of the applicant's claim for further loss of income and earning capacity, the parties agreed that an independent expert make a determination of the quantum of such loss, subject to an error of law in the

determination being appealable to the High Court. After noting such an appeal the parties accepted that this court had no jurisdiction to hear such an appeal. The applicant effectively contended for the imputation of a tacit term of their settlement to the effect that in the event of this court not having jurisdiction, an appellate tribunal as agreed or , failing agreement, as appointed by the President of the Law Society should decide an appeal on an error of law. Relief to that effect granted.

ORDER

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a) Declaring that a tacit term to the following effect is to be imputed in clause 2.9 of the parties' settlement agreement.

> '..... or in the event of the court not having jurisdiction to hear such an appeal, it would lie to an appeal panel comprising one or more advocates of at least 10 years standing as agreed upon by the parties or in the absence of agreement, by such a panel as appointed by the President of the Law Society.'

a) The first respondent is to pay the applicant's costs of this application, to include the costs of one instructing and one instructed counsel.

JUDGMENT

SMUTS, J

(a)

(b) The applicant sustained injuries in a motor vehicle accident on 1 November 2000. In 2004, he instituted an action against the Motor Vehicle Accident Fund ("the Fund"), cited as the first respondent in this application. That

action eventually settled and the settlement agreement was made an order of this court. In terms of the settlement, the Fund agreed to pay to the applicant certain amounts and gave an undertaking in respect of future medical costs. The respondents' claim for future loss of earnings and loss of earning capacity could not be agreed upon. In terms of the settlement agreement, the parties agreed that this issue would be submitted to an expert for determination.

(c) The expert (cited as the second respondent) subsequently made a determination of N$410 400 for loss of earning capacity. The settlement agreement provided that neither party would be entitled to review or appeal the determination except on an error of law, in which event the dissatisfied party could appeal on that point of law to the High Court.

(d)

(e) The applicant was unhappy with the determination and sought to note an appeal to the High Court in terms of the settlement agreement. That "appeal" was opposed by the Fund and the matter was allocated to a judge in case management. But when the matter proceeded to case management, Miller, AJ questioned whether it was possible to appeal against the determination to the High Court and questioned whether this court had jurisdiction to entertain such an appeal by agreement between the parties.

(f)

(g) The applicant was subsequently advised that this court would not have jurisdiction to hear such an appeal. The matter was removed from the roll by agreement.

(h) After the matter was removed from the roll, the applicant was advised that the determination by the expert was not an arbitration and that the Fund should be approached to agree to an appeal on a question of law being heard by an appeal tribunal constituted of a more senior advocate than the expert or a tribunal of two advocates. To that end, the applicant's legal practitioner approached the Fund to appoint such a tribunal. But the Fund's legal practitioner responded that the settlement agreement did not make provision for such a panel or tribunal and rejected the applicant's approach. The applicant thereafter brought this application.

(i)

(j) The main relief sought in this application is for an order directing that the determination by the expert be reviewed by an appeal tribunal to be appointed by agreement between the parties within 14 days of this order or failing such agreement, by the President of the Law Society. In the alternative, the applicant seeks to review and set aside the second respondent's determination and for an order referring the matter back to the expert to reconsider his determination with or without further directions by this court. At the hearing of the application, Ms Bassingthwaighte, who appeared for the applicant, submitted that this court, by virtue of the evidence placed before it, was in a position to make its own determination if satisfied that the determination by the expert were to be set aside and should do so.

(k) Before I refer to the position taken by the Fund in this application, I first set out some relevant background factual matter. The expert, cited as second respondent in these proceedings, does not oppose this application.

(l)

(m) Central to this application is the portion of the settlement agreement relating to the appointment of the expert, his terms of reference and the appeal clause. The relevant terms are as follows:

> '1.1 The PARTIES agree that the DEFENDANT has in principle agreed to compensate the PLAINTIFF in respect of a loss of earnings/ capacity.
>
> 1.2 The PARTIES have, however, not agreed to the quantum of the loss of earnings / capacity and hereby agree to refer the dispute as regards the quantum of the loss of earnings / capacity for determination by an expert who shall not be regarded as an arbitrator.
>
> 2.2 The PARTIES agree to appoint Adv Dave Smuts or Dr Sakkie Akwenda as the Expert, failing his acceptance of appointment within 10 days of signature of this agreement, the President of the Law Society of Namibia shall appoint the Expert who shall be an admitted Advocate with not less than 10 years experience.

2.3 The decision of the expert will be final and binding on the PARTIES.

2.5 The provisions of this clause:

2.5.1.1 constitute an irrevocable consent by the PARTIES to any proceedings in terms hereof and no Party may withdraw therefrom or claim at any such.

2.5.1.2 are severable from the rest of this Agreement and will remain in effect despite determination of or invalidity for any reason of this Agreement

2.6 The expert is authorised to individually approach and question the PLIAINTIFF and DEFENDANT, any medical practitioner or other witness in the absence of the other PARTIES in order to obtain evidence that he might deem necessary for purposes of making a final determination of the dispute.

2.7 The scope of the determination and the PLAINTIFF'S claims are as formulated in the pleadings of this matter and as the expert shall further determine, establishing the facts and issues which are relevant to the determination of the dispute.

2.8 There shall not be a hearing. As soon as practicable, the expert shall make a determination in the form of a written determination with reasons.

2.9 No PARTY shall be entitled to institute legal proceedings to review or appeal the determination, which shall be final and binding upon the PARTIES, except on an error of law in which case the relevant PARTY may appeal on that point of law to the High Court.'

(n) It is common cause that when preparing this agreement, the parties were both under the impression that this court would have the jurisdiction to hear an appeal on a question of law. This was after all expressly included in clause 2.9. It is also common cause that the parties thereafter conducted themselves on the

basis that such an appeal could proceed up until the stage of Miller, AJ pointing out to the parties that they could not by agreement confer jurisdiction on this court which it would not otherwise have. I respectfully agree with his approach which was also accepted by counsel engaged by the applicant after this had been pointed out by Miller, AJ.

(o) Ms Bassingthwaighte, in support of the main relief, contended that effect should be given to the underlying intention of the parties to have a limited form of appeal against the determination of the expert. Ms Bassingthwaighte pointed out that the parties had in terms of clause 2.9 agreed to limit the right of appeal or review to instances where the expert committed an error of law. In all other respects, the determination would be final and binding upon them. She submitted that the reference to the High Court, which was subsequently found to lack jurisdiction, should not mean that the parties would have no review or appeal on a question of law as their common intention would thus be thwarted in those circumstances.

(p)

(q) Ms Bassingthwaighte submitted with reference to *Scottish Union and National Insurance Co Ltd v Native Recruiting Corporation Ltd* [1] that the fundamental principle in the interpretation of contractual terms would be to gather the intention of the parties and to give effect to that intention. Ms Bassingthwaighte further submitted, with reference to well established authorities, [2] that the court would prefer a construction of contractual terms which would uphold the intention of the parties as opposed to one which would render it void or ineffectual and further that a court would lean to an interpretation which would accord an equitable construction on a contract.

(r)

(s) Ms Bassingthwaighte accordingly submitted that, the parties having intended to create an effective right to appeal, this court should then interpret the agreement in such a way to give effect to that intention by utilising the

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[1] 1934 AD 458 at 465

[2] *Credit Guarantee Insurance Corporation of SA Ltd v Schreiber* 1987(3) SA 523 (W) at 526 D-E; *Rand Rietfontein Estates v Cohn* 1937 AD 317 at 330 – 331; *South African Forestry Co v York Timbers Ltd* 2005(3) SA 323 (SCA) at 340.

mechanism for appointing an appeal tribunal which the parties had agreed[3] would apply if the nominated experts to accept their appointment for the President of the Law Society to make the appointment and thus also an appellate tribunal.

(t) In the alternative, Ms Bassingthwaighte submitted that the expert's determination should be reviewed and set aside by this court exercising its common law jurisdiction in respect of determinations of that nature.

(u) The Fund opposes the relief sought by the applicant. The Fund relies upon the provisions of the settlement agreement. It pointed out that the parties had wanted to bring finality to the matter and that the expert's determination could not be reviewed or appealed against, except upon an error of law. The deponent to the Fund's affidavit furthermore stated that he did not understand that the arbitrator had committed an error of law and on that basis denied that a review against the determination was competent. But the Fund's deponent importantly accepted that the applicant had a right of appeal limited to where the expert had committed an error of law. The deponent however then reiterated his denial that the applicant had established an error of law committed by the second respondent.

(v) The Fund was represented in these proceedings by Mr Khama. He took a position not raised in the answering affidavit and argued that the parties had reached a settlement agreement on the issue of quantum – that it would be by way of determination by an independent expert. He submitted that the settlement agreement was a compromise or *transactio* and that the issue had become *res judicata* by operation of law and was no longer open for litigation.

(w) He further submitted that the applicant had no right to challenge the determination in the form of an appeal or a review to this court and that it was final and binding upon the parties.

(x)

(y) As to his first contention, it is clear that it begs the fundamental question

[3]In clause 2.2.

raised by the main relief sought in these proceedings. There had of course been a compromise. That was not disputed by the applicant. Nor was its binding effect. The applicant however argues for a certain interpretation to be given to that compromise in the form of the settlement agreement. It is plainly open to a litigant to seek relief of that nature without the defence of *res judicata* arising - in contending for an interpretation to be given to the settlement agreement itself. Whether or not the interpretation contended for by the applicant is sustainable is of course an entirely different question. But it would be open to a party to apply for a declarator or other related relief concerning a settlement agreement without being prevented from doing so by to the defence of *res judicata* being raised against him, as has been argued by Mr Khama.

(z) The question is rather whether the interpretation contended for by Ms Bassingthwaighte is tenable and sustainable in the circumstances.

(aa)

(bb) Whilst it is entirely correct that the parties had agreed that the determination would be final and binding except for an error of law, in which case an appeal would by agreement lie to this court. The question then arises as to whether the failure of that clause, by reason of this court not having jurisdiction to hear such an appeal, can result in the interpretation urged by Ms Bassingthwaighte, namely that effect should be given to the intention of the parties by directing that an appeal tribunal be appointed by the President of the Law Society, the mechanism for appointment agreed upon by the parties in the absence of the identified experts in the agreement being able to perform the function as experts.

(cc)

(dd) Although Mr Khama raised the defence of compromise as a bar to the main relief sought by the applicant, he did not raise a related point encapsulated in the general principle that once a court has pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it.[4] The reason for this is that the court is *functus officio*. There are however exceptions to this fundamental rule, neatly set out in *Firestone v Genticuro*.[5] These do not apply

[4]Supra at 306-7.

[5]*Firestone South Africa (Pty) Ltd v Genticuro* AG 1977 (4) 298 (A) at 306 F; See also *Mostert NO*

because what is to be interpreted is after all the parties' settlement agreement which was made an order of court and not the court's judgment or order so as to give effect to the true intention of the court. The enquiry is thus one of construction and interpretation of the (settlement) contract between the parties.

(ee) What the applicant in essence seeks in the main relief is for the importation of a tacit term that in the event of the court not having jurisdiction to hear an appeal on an error of law, the parties would then appoint an appeal panel or failing agreement upon such panel, the President of the Law Society would do so.

(ff) The fund in its opposition agreed that there should be an appeal on an error of law but disputes that the issue raised by the applicant amounts to an error of raw. But this position would not in my view, even if valid, result in the failure to import such a tacit term. Whether or not the question raised by the applicant amounts to an error of law would be for the appellate panel to decide.[6]On the contrary, the fund emphatically confirms that the parties both intended an appeal against the determination of the expert on a question of law. The appellate body agreed upon was this court. There was no fall back or default position to apply in the event of this term failing by reason of a lack of jurisdiction. A tacit term implied by the facts of a matter was authoritatively described by Corbett AJA (as he then was) in *Alfred McAlpine & Son v Transvaal Provincial Administration*[7] as:

'. . . an unexpected provision of the contract which derives from the common

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v Old Mutual Life Insurance Co (SA) Ltd 2002 (1) SA 82) SCA) at par [5].

[6] Whilst it may form a basis to oppose the application on the grounds that it would serve no purpose to fund for a tacit term by reason of the fact that the applicant's dissatisfaction with the determination does not constitute an error of law, it would in any event appear to me that the error contended for by the applicant would, if established, amount to such an error. The applicant in essence contends that the expert, after setting out applicable legal principles, failed to appreciate the nature of the enquiry before him by treating the enquiry as one for loss of actual income rather than loss of future income and earning capacity. That would seem to me to amount to an error of law, if established. As the question itself would serve before an appellate panel, I refrain from expressing any view on the matter.

[7]1974 (3) SA 506 (A) at 531-2 at a time when the South African Appellate Division was the highest court of appeal for Namibia.

intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties.'

(gg) The test to be employed in determining whether a tacit term can be implied was usefully summarised as follows:[8]

'A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional.'

(hh) In this instance, the tacit term sought to be implied by the applicant is not in contradiction of the express terms of the settlement agreement. On the contrary, such a mechanism is employed as the fall back or default position in the event of both nominated experts not accepting (or being unable to do so) the appointment as such. Clearly, the parties had not applied their minds to the question or possibility of this court not having jurisdiction. This is not only evident from the terms of the agreement itself but also borne out by their subsequent conduct.

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[8] *Wilkens NO v Voges* 1994 (3) SA 130 (A) at 136 to 137 C; See generally Christie The Law of Contract in South Africa (5th ed, 2006) at 167.

(ii) What is of great significance is that both parties intended an appeal on an error of law. If they had further considered the possibility of the court not having jurisdiction, it is clear that they would have addressed that eventuality, given their intention and the fact that they had done so in the event of both nominated experts not accepting their appointment. It would seem to me from the terms of the agreement and the facts set out in their application, that had the parties thought about or anticipated that possibility, they would have agreed upon mechanism to give effect to their jointly held intention. As a matter of inference, this would seem to be what the parties would have had in mind. It would also be necessary to give effect to their intention to provide for an appeal on an error of law on the part of the expert, given the ineffective appellate provision.

(jj) I accordingly find that the applicant has established that there was a tacit term to be implied into clause 2.9 of the settlement agreement to the following effect:

> '. . .or in the event of the court not having jurisdiction to hear such an appeal, it would lie to an appeal panel comprising one or more advocates of at least 10 years standing as agreed upon by the parties or in the absence of agreement, by such a panel as appointed by the President of the Law Society.'

(kk) In view of the conclusion I have reached in this matter, it is not necessary for me to consider the interesting question of the nature and ambit of a review of a quasi-arbitrator in the position of the expert.

(ll)

(mm) It would also follow from this conclusion that an order in the precise terms sought in paragraph 1 of the notice of motion would not be granted but rather an order set out below declaring the tacit term to be implied. The effect of granting such an order in that the applicant is substantially successful in this application and is thus entitled to his costs. Both parties engaged instructed counsel. The costs order is then to include those costs.

(nn) I accordingly make the following order:

a) Declaring that a tacit term to the following effect is to be

imputed in clause 2.9 of the parties' settlement agreement.

> '. . .or in the event of the court not having jurisdiction to hear such an appeal, it would lie to an appeal panel comprising one or more advocates of at least 10 years standing as agreed upon by the parties or in the absence of agreement, by such a panel as appointed by the President of the Law Society.'

b) The first respondent is to pay the applicant's costs of this application, to include the costs of one instructing and one instructed counsel.

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SMUTS, J

Judge

APPEARANCES

APPLICANT:	N Bassinghwaighte
Instructed by	Nakamhela Attorneys
FIRST RESPONDENT:	D Khama
Instructed by	Ueitele & Hans Inc.