REPORTABLE

CASE NO: SA 4/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ELIZABETH MBAMBUS **Appellant**

and

MOTOR VEHICLE ACCIDENT FUND **Respondent**

Coram: DAMASEB AJA, ZIYAMBI AJA and GARWE AJA

Heard: **4 July 2014**

Delivered: **11 February 2015**

APPEAL JUDGMENT

GARWE AJA (ZIYAMBI AJA concurring):

[1] I have read the judgment of my brother Damaseb AJA (as he then was). The judgment aptly sets out the facts of this case. In the judgment Damaseb AJA accepted as a general proposition that it would not be permissible for the Motor Vehicle Accident Fund (the Fund) to settle by compromise a claim arising from the

unlawful conduct of a deceased upon whom a claimant depended. He, however, found that on a consideration of the facts of this case the conclusion was inescapable that the Fund either was satisfied that the deceased was not the author of his own death or that the Fund was unable to prove that he was. On the further grounds that the Fund was *proferens* in regard to the settlement agreement and its content and that it had also subsequently engaged in conduct against its own interest so as to be presumed to have conceded that it settled the claim in order to avoid litigation, Damaseb AJA came to the conclusion that a valid compromise had taken place. In the event, he set aside the order of the court *a quo* and in its place substituted an order answering the question referred by the parties in favour of the plaintiff (appellant in this appeal) and ordering payment of the amount in dispute together with interest and costs of suit.

[2] Having carefully considered the judgment by Damaseb AJA, I am, with respect, unable to agree with the various conclusions of fact and law made therein. For reasons that follow, I am of the view that, taking into account the entirety of the facts, there was no stated case before the court *a quo* and consequently the matter should not have been dealt with as such.

[3] The respondent, the Fund, is a statutory body created under the Motor Vehicle Accident Fund Act 4 of 2001, which has since been repealed by Act 10 of 2007. Its function is to investigate and possibly settle claims for compensation by persons who suffer loss or damage as a result of bodily injury to themselves or others, or where

death occurs, to the dependants of the deceased. The rider to this power is that the Fund is not permitted to pay compensation to any person or dependant of a deceased person, arising from the unlawful conduct of the claimant or of the deceased upon whom a claimant was dependent.

[4] The Fund in terms of s 3(1)*(b)* of the repealed Act, had the power to settle claims, but subject to the Act. The court *a quo* in my view was correct when, in this regard, it remarked at para 10 of the judgment:

> 'It is significant that the defendant is granted the express power to settle claims, in other words, to enter into compromises of claims arising under s 10. By referring to s 10, the power to settle is limited to claims where the claimant is not the driver, or a dependant of a driver, by whose negligence the injury or damage was caused . . . '

[5] Para 1.2 of the stated case referred to the court *a quo* reads as follows:-

> 'The defendant alleges the accident was caused by the negligent, unlawful driving of the deceased . . . in that the deceased . . . was driving the lane (*sic*) of oncoming traffic and collided head on with a truck driven by a certain Mr L Jacobs.'

[6] The court *a quo* approached the matter on the basis that both parties accepted that the deceased had driven on the lane of oncoming traffic causing the accident which claimed his life. Whether or not the court *a quo* was correct in doing so is an issue that will be dealt with shortly. It is clear however that based on that finding the

court *a quo* concluded that the settlement relied upon by the appellant (plaintiff in the court *a quo*) had not been properly concluded and was therefore null and void.

[7] Proceeding on the assumption that the deceased had indeed unlawfully caused the accident which resulted in his death, the court *a quo* was correct in its application of the law, a position accepted by Damaseb AJA in his judgment. The court *a quo* stated at para 10 of the judgment:

> '. . . In the *Metals Australia* case the Supreme Court made it clear that although the validity of an agreement of compromise does not generally depend on the validity of any contract it replaces, nevertheless, for it to be a binding contract, the compromise agreement must have been properly concluded (see [27]F-G). In the context of a public body like the defendant a properly concluded contract would mean a contract which it had the power to conclude. The principle is well-established and clear that a public body created for a particular purpose with statutory powers cannot validly exercise powers not expressly or impliedly authorised (*De Villiers v The Pretoria Municipality,* 1912 TPD 626) . . . '

[8] The position is, I think, well settled that anything that is done contrary to the law is void. In the oft - quoted Zimbabwean case of *Muchakata v Nertherburn Mine* 1996 (1) ZLR 153 (SC) Korsah JA, remarked at 157B-C:

> 'If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As Lord Denning MR so exquisitely put it in *MacFoy v United Africa* Co Ltd [1961] 3 All ER 1169 at 1172I:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad . . . And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".'

Put another way, if the Fund entered into the compromise well knowing that the deceased had unlawfully caused the accident, then such compromise would have been void and in a law a nullity. And if it was a nullity, no rights or cause of action could flow from it.

[9] Both parties to this appeal agreed that the Fund could, in an appropriate case, compromise a claim. If, as Damaseb AJA noted, the Fund was uncertain as to its prospects of success at trial, it could quite competently settle a claim. Once that happened, that would be the end of the matter. Its effect would be the same as *res judicata* on a judgment given by consent and neither party would have any cause of action thereafter on the same facts, unless the right to rely thereon was reserved. For this reason a party cannot raise defences to the original cause of action except in cases where the compromise was induced by fraud, duress, *justus* error, misrepresentation, or some other ground for rescission. *Georgias v Standard Chartered Finance Zimbabwe* Ltd 2000 (1) SA 126 (ZS), at 138I–140D, quoted with approval in *Metals Australia Ltd and Another v Amakutuwa and Others* 2011 (1) NR 262 (SC) para 21.

[10] The issue that arises on the facts of this case is whether there was in fact a stated case before the High Court.

[11] The Rules of Court of a number of countries make provision for submission to a court of questions of law in the form of a 'stated case' or a 'special case.' Attention is drawn as an example to Rule 49(10) of the Uniform Rules of Court of South Africa, order 29 of the High Court of Zimbabwe Rules, 1971 and in Namibia Rule 33 contained in Government Notice 59 of 1990 which has since been repealed and substituted by rule 63 of the Rules of the High Court of Namibia, Government Notice 4 of 2014 dated 24 December 2013.

[12] Rule 33, which was the rule in operation at the relevant time, provided, in relevant part, as follows:

> **'SPECIAL CASES AND ADJUDICATION UPON POINTS OF LAW**
>
> 33.(1) The parties to any dispute may, after institution of proceedings, *agree upon a statement of facts* in the form of a special case for the adjudication of the court.
>
> (2)(a) Such statement shall *set forth the facts agreed upon*, the questions of dispute between the parties and their contentions thereon, and such statement be divided into consecutively numbered paragraphs and there shall be attached thereto copies of documents necessary to enable the court to decide upon questions, and it shall be signed by counsel on behalf of party or, where a party sues or defends personally, by such party.
>
> (b) . . .

> (c) . . .
>
> (3) At the hearing thereof the court and the parties may refer to the whole of the contents such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial.
>
> (4) . . .
>
> (5) . . .
>
> (6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial, and the court may give judgment without hearing any evidence." (Italics for emphasis.)

[13] My understanding of the above provisions is that the parties must agree on the facts and the issues in dispute between them, including any issues of law arising therefrom. I agree with the submissions by the respondent that the intention is that the stated case will adjudicate the whole of the dispute as stated in the case that exists between the parties and that this is ideally done by setting out the facts agreed to, the questions of law in dispute and the contentions of the parties. The parties may also require a court to decide an issue of law on the basis of alleged facts, as if agreed.

[14] A stated case:

> '. . . is a written statement of the facts in a litigation, agreed to by the parties, so that the court may decide these questions according to law . . . It is also known as a case stated.' *Strouds Judicial Dictionary*, 4 Ed.

'. . . involves stating facts, that is, the ultimate facts, requiring only the certainty of some point of law applied to those facts to determine either the whole case or some particular stage of it.' *Australian Shipping Board v Federated Seamens Union of Australasia* (1925), 36 CLR 442, 450.

[15] In the Irish case of *Simon McGinley v The Deciding Officer Criminal Assets Bureau,* [2001] IESC 49, the Irish Supreme Court (per Denham J) had the following to say on what is required in a stated case:

'4. Decisions relating to the form of cases stated to the High Court are helpful in considering the form of case stated to the Supreme Court. In *Emerson v Hearty and Morgan* [1946] N.I. 35 Murphy L.J. described the required form at pp. 36-7 of the report:

> "We have thought that this may be a convenient opportunity to call attention to the principles which ought to be observed in drafting Cases Stated.
>
> The Case should be stated in consecutively numbered paragraphs, each paragraph being confined, as far as possible, to a separate portion of the subject matter. After the paragraphs setting out the facts of the Case there should follow separate paragraphs setting out the contentions of the parties and the findings of the Judge.
>
> The Case should set out clearly the Judge's findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings.
>
> What is required in the Case Stated is a finding by the Judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the Case Stated save in the one type of case where the question of law intended to be

submitted is whether there was evidence before the Judge which would justify him in deciding as he did.

The point of law upon which this Court's decision is sought should of course be set out clearly in the Case. But we think the Judge is certainly entitled to expect the party applying for the Case Stated to indicate the precise point of law upon which he wishes to have the decision of the appellate Court. It would be convenient practice that this should ordinarily be done in the written application for the Case Stated."

5. This decision was applied by Blayney J. in *Mitchelstown Co-Operative Society v Commissioner for Valuation* [1989] I.R. 210 and in *Department of the Environment v Fair Employment Agency* [1989] N.I. 149.

In *Mitchelstown Co-Operative Society v Commissioner for Valuation* [1989] I.R. 210 at pp. 212-3 Blayney J., agreeing with and adopting the principles set out by Murphy L.J. in *Emerson v Hearty & Morgan* [1946] N.I. 35, stated:

"I am in complete agreement with, and I respectfully adopt, this statement of the principles to be observed, but an examination of the case stated by the Tribunal shows that is has not been drafted in accordance with those principles.

The case does not contain any clear statement of the facts found by the Tribunal.

. . . This court should not be required to go outside the case stated to some other document in order to discover them.

The same principle applies to the contentions of the parties; the inferences to be drawn from the primary facts, and the Tribunal's determination. All these must be found within the case, not in documents annexed . . .

. . .

> For all the foregoing reasons I am satisfied that I must return the case to the Tribunal for amendment and, if necessary, for re-statement".'

[16] Whilst the above remarks were made in the context of s 16 of the Courts of Justice Act, 1947 of Ireland, the principles enunciated therein apply equally to the present proceedings. A court can only deal with a stated case where the facts are agreed upon and the court is asked to make a determination of the inferences or the law to be drawn from those facts.

[17] The difficulty in the present case emanated from the way the stated case was formulated.

[18] Para 1.2 of the stated case reads:

> 'The defendant *alleges* the accident was caused by the negligent unlawful driving of the deceased . . . (in that he) was driving the lane (*sic*) of oncoming traffic and collided head on with a truck driven by a certain Mr L Jacobs.'

[19] The meaning of the above statement is not clear. The Fund was in fact saying the deceased had been the author of his own misfortune and consequently his dependants could not secure a benefit from the Fund in terms of the law. The plaintiff in that case, who is the present appellant, did not suggest that, for the purposes of the stated case, the statement would be accepted as correct. Considering that the pith of

s 10 of the Act was that a party in the wrong should not benefit from his own misdoing, it was vital that the parties agree on the factual position on this aspect. As it turned out the parties were not agreed that the deceased had been at fault, a position that obtained even at the hearing of this appeal.

[20] Mr Frank, in para 21 of the respondent's heads, states that it is a matter of undisputed fact that the death of the appellant's husband was his fault and that had there been any suggestion that there was a dispute in this regard, the position would have been different.

[21] In his oral submissions before this court, Mr Namandje made it clear that it was not common cause before the High Court that the deceased was the cause of the accident and that at no stage had the appellant admitted this.

[22] Indeed my brother Damaseb AJA was alive to this difficulty when he prepared the lead judgment. In para [50] of the judgment he notes the divergence of views between Frank and Namandje. In para [65], he further noted that, faced with two equally plausible scenarios of the stated case, the High Court gave an unfair advantage by assuming that it was common cause that the deceased caused his own death. In para [68], he concedes that the agreed facts were 'at best ambiguous and at worst, meaningless'. In para [77] Damaseb AJA, quite correctly in my view, remarks that it is undesirable to resolve a matter on a stated case where there is more that one possible interpretation of the facts which, if accepted as an established

fact, may lead to a different legal conclusion and that the court *a quo* could have quite properly refused to determine the matter on the basis that it was a stated case.

[23] As Damaseb AJA quite correctly comments in para [72] of the judgment, no-one knows quite how, when and why the Fund had a change of heart and why it then alleged that the deceased had been at fault. We do not know whether the Fund knew, at the time it attempted to settle the matter, that the deceased had been at fault. We do not know whether this was a fact which later came to the attention of the Fund. In my view, the proceedings having been brought by way of stated case, it is undesirable and perhaps even wrong, given the divergence between the two parties on this crucial issue, to infer that the respondent must have been satisfied that the deceased had been at fault.

[24] In including the narration that the respondent was alleging that the deceased had been at fault in the stated case, the parties should have gone further to clarify what the respective position of each of the parties was on this contentious issue. Instead the matter was left hanging and, not surprisingly, the High Court proceeded on the basis that this was common cause, when in fact it was not.

[25] In the result, I am of the considered opinion that not all the facts were placed before the High Court and that the court did not have the capacity, in the absence of further clarification or evidence, to resolve the matter. Since the pith of the matter was whether the deceased had been at fault, the court *a quo* should, in the

circumstances, have refused to deal with the matter as a stated case and referred it to trial in the ordinary way. The court misdirected itself in proceeding to assume that it was common cause that the deceased had been at fault.

[26] Given the above finding, it seems to me that the appropriate order should have been one referring the matter to trial in terms of the rules in the ordinary way.

[27] On the question of costs I am of the view that, since neither party has been more successful than the other and since both parties were at fault in not clearly stating whether the deceased unlawfully caused the accident, each party should pay its own costs, both in this court and the court *a quo.*

[28] In the circumstances, I would set aside the decision of the court *a quo* and make the following order:

1. The appeal succeeds and the matter is referred back to the High Court.
2. Each party is to pay its own costs on appeal and in the court *a quo.*
3. The order of the High Court is set aside and in its place the following order is substituted:

‘The matter is referred to trial in terms of the Rules of this Court.’

_____
GARWE AJA

ZIYAMBI AJA

[29] I have read the judgments of my brothers Damaseb AJA (as he then was) and Garwe AJA.

[30] I am inclined to agree with the views of Garwe AJA that there was no stated case before the High Court, and that, for that reason, the matter ought to have been referred to trial. I therefore agree that the appeal should be allowed and that each party should pay its own costs, both in this court and in the court *a quo.*

_____
ZIYAMBI AJA

DAMASEB AJA (dissenting):

[31] This is an appeal against a judgment and order of the High Court in respect of a case stated to it by the parties in terms of old rule 33(1) of the Rules of the High Court. The respondent (the Fund) is a statutory body created by the repealed Motor Vehicle Accidents Fund Act[1] (the Act) with, *inter alia*, the following objects contained in s 10 of the Act:

[1] Act 4 of 2001, repealed by Act 10 of 2007.

'(1) The Fund shall –

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver of the motor vehicle has been established; or

(b) subject to a regulation made under section 17, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver has not been established,

pay out compensation to a person who has suffered loss or damage as a result of bodily injury to himself or herself, or bodily injury to or the death of any person, in either case caused by or arising out of the driving of a motor vehicle by any person at any place in Namibia, if the injury or death was due to negligence or other unlawful act of the driver of the motor vehicle in question, the owner of the motor vehicle in question or of an employee of the owner of the motor vehicle in the execution of that employee's duties as an employee of the owner of that motor vehicle.'

[32] In terms of s 3(1)*(b)* of the Act, the Fund was given the function 'to investigate and settle, subject to this Act, claims arising under s 10'. As the court *a quo* correctly found, this function authorised the Fund 'to enter into compromises[2] of claims arising under s 10'.

[33] The plaintiff by way of combined summons commenced action in the High Court seeking the following relief:

'(a) Payment in the amount of N$77 887,31;

[2] The nature and effect of a compromise is discussed at paras [13], [14] and [15] of this judgment.

(b) Interest at 20% per annum from the date of judgment to the date of final payment;

(c) Costs of suit;

(d) Further and or alternative relief.'

The plaintiff relied on a written agreement concluded on 24 January 2006 in terms of which the Fund, as the appellant alleges, was bound to make the payments. She specifically alleges that the Fund breached the agreement between the parties when it failed or refused to pay the payments demanded, and further when it unlawfully and unilaterally purported to repudiate its obligations by cancelling the agreement.

[34] The claim was a sequel to a purported cancellation by the Fund of an agreement concluded between the appellant and the Fund in relation to a claim submitted by the appellant to the Fund following the death in a motor vehicle accident of the appellant's husband and father of their three minor children on whose behalf the appellant is acting. The appellant had sued the Fund in her personal capacity and, in a representative capacity, on behalf of the minor children of the marriage. The cause of action was based on a written agreement (the settlement agreement) concluded on 24 January 2006 in the following terms:

'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 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.' (Own emphasis.)

'This document constitutes the sole record of the agreement between the parties in regard to the subject matter thereof. No addition, variation or cancellation of this agreement shall have any force or effect unless in writing and signed by or on behalf of all the relevant parties.' (Own emphasis.)

[35] The terms of agreement dated 24 January 2006 provide as follows:

'(a) Pay the plaintiff an amount of N$72 559,91 upon conclusion of the agreement;

(b) 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 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 amount of N$15 577,49 for the minor child Lea N Mbambus.'

[36] It is common cause that the settlement agreement was preceded by a letter dated 19 December 2005 (the initial letter) written to the plaintiff by the Fund's Claims Assessment Manager in the following terms:

'The claim refers. Attached please find a draft agreement that contains proposals for the settlement of your claim. If you find the proposed terms acceptable, kindly please sign the agreement and return it to the Fund. 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. Once this has happened, the Fund will process your payment.' (My underlining for emphasis.)

[37] It is an important consideration that in terms of s 13(2) of the Act:

> 'If the Fund does not, within 60 days from the date on which a claim was sent or delivered to it as prescribed, object to the validity of that claim, that claim shall for all purposes, be deemed to be valid in law.'

This provision makes clear that the Fund had to conduct whatever investigation it deemed necessary to establish liability with some urgency and that if no objection was made to the claim it was, by law, a valid claim regardless of the circumstances. If objection was made, a dispute and potential litigation would have arisen.

[38] The Fund paid to the plaintiff the initial amount of N$72 000 in terms of the settlement agreement. Thereafter, the Fund refused to pay the balance of the agreed amount purporting to cancel the agreement on the ground that it had no competence to settle a claim in relation to a driver who was the negligent cause of an accident. That purported cancellation was recorded in a letter of 21 December 2006 written by the Fund's Claims Assessment Manager as follows in so far as it is relevant for present purposes:

> 'On the 24 January 2006 the Fund settled a claim for loss of support arising out of an accident which occurred on 24 February 2006 (sic) in which Fillemon Mbambus was regrettably killed. The facts of the accident were that the accident was due to the negligent /unlawful driving of the deceased Fillemon Mbambus. The deceased . . . was driving in the lane of oncoming traffic and collided with a truck driven by L Jacobs. The deceased was the sole cause of the accident and is found to have been the author of his own misfortune. The deceased thus failed to prevent an accident in

> circumstances where a reasonable driver would have driven cautiously and would have kept in his lane. By Board resolution dated 26 October 2006 the Fund accepted legal advice it received from two senior counsels (sic) that unfortunately it is not permitted to pay on a claim submitted by a dependent of a deceased person if that person was killed in a motor vehicle accident caused by himself or herself. So if a person kills himself or herself the children of such person have no claim on the Fund. The reason for this is that in terms of section 10(1) as read with section 10(4) of the [Act], the Fund is only allowed to pay for loss or damage arising out of an accident that is caused by a driver or owner of a motor vehicle who is not the person claiming or is not a dependent of such person. In the circumstances the Fund has concluded that it was in error in settling this claim.
>
> . . .
>
> Please note that the Fund does not seek to recover the monies that it has already paid . . . .'

[39] The appellant then started a process to exact payment of the balance of the agreed compensation by way of summons in the High Court. The Fund defended the action and the appellant applied for summary judgment in the High Court and failed, and the Fund was granted leave to defend the action. The Fund resisted the claim on the basis that it:

> '. . . is a creature of statute and only has the powers and authority conferred on it by the creative deed. The creative deed (i.e. The Motor Vehicle Accidents Fund Act, 2001) provides in section 10 the basis of liability by the Fund. Section 10(1) as read with section 10(4) of the Motor Vehicle Accidents Fund, 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 . . . the Defendant further pleads that the agreement purportedly concluded by the Defendant with Plaintiff is *ultra vires* its powers and thus void *ab initio.*

. . . that since the agreement between it and the Plaintiff is void *ab initio* there is no valid agreement which it could breach.'

[40] Upon the matter becoming defended, the parties agreed to state a special case from which the history of the matter becomes partially apparent.

Facts agreed in terms of rule 33(1)

[41] The parties stated a case under rule 33(1) as follows:

'1.1. On 24 February 2005, the plaintiff's husband, the late Fillemon Mbambus, was killed in a Motor Vehicle Collision (sic), which occurred on the Western Bypass, in Windhoek.

1.2. The Defendant alleges the accident was caused by the negligent, unlawful driving of the deceased . . . [in that he] was driving [in] the lane of the oncoming traffic and collided head on with a truck driven by a certain Mr L Jacobs.

1.3. Following the death of her [h]usband, the Plaintiff on behalf of herself and the minor children from the marriage between her and her late husband submitted a claim in terms of the Motor [V]ehicle Accidents Fund Act, 2001 [Act 4 of 2001].

1.4. The Defendant accepted the claim and on 23 January 2006 entered into an agreement with the Plaintiff to compensate the Plaintiff and her three minor children in respect of the future damages which they suffered. A copy of the agreement is annexed hereto and marked "A".

1.5. On the 3rd of October 2006 the Defendant wrote to the Plaintiff and informed her that the Defendant had made a mistake by accepting liability and paying

out her claims. The Defendant further informed the Plaintiff that the agreement concluded on 23 January 2006 was a nullity in that it ('the Defendant') did not have the power to conclude such an agreement. A copy of the letter is annexed hereto and marked as "B".

1.6. After the Plaintiff received the letter mentioned in paragraph (e) she issued summons . . . against the Defendant claiming payment in the amount of N$72 559,91. The Defendant entered notice to defend the action.

1.7. After the Defendant entered notice of intention to defend, the Plaintiff invoked the provisions of Rule 32 of the High Court Rules and applied for summary judgment. The High Court of Namibia granted the Defendant leave to defend the action.

1.8. After this Honourable Court granted the Defendant leave to defend the action the parties agreed to in terms of Rule 33 of the High Court Rules present a stated case to the court for adjudication.'

[42] Having thus set out the agreed facts, the parties stated the issue for determination by the court as follows:

'The issue which the parties want this Honourable Court to adjudicate is whether the Defendant can escape liability in terms of the settlement agreement by relying on a defense pertaining to the original cause of action. In other words, can the Defendant rely on the Motor Vehicle Funds Act, 2001 to escape liability under the settlement agreement?'

Proceedings in the High Court

[43] It is common cause that in the High Court the appellant relied on a compromise, being the settlement agreement between the parties, and not on the

original cause of action; in other words, she did not sue the Fund as contemplated in s 13(4). This is the point that the majority judgment overlooked.

[44] The High Court correctly stated the nature and effect of a compromise as discussed by this court in *Metals Australia Ltd and Another v Amakutuwa and Others*[3], as follows:

> 'A compromise is a form of agreement the purpose of which is to put an end to existing litigation or to avoid litigation that is pending or might arise because of a state of uncertainty between the parties. Ordinarily, the validity of an agreement of compromise does not depend on the validity of a prior agreement. An agreement of compromise may follow upon a disputed contractual claim but it may also follow upon any form of disputed right and "maybe entered into to avoid even clearly spurious claim." *Hamilton v Van Zyl* 1983 (4) SA 379 (E) at 383E-F. The effect of an agreement is that it bars the bringing of proceedings on the original cause of action'. (My underlining for emphasis; case references omitted.)

[45] In *Metals Australia*, the Supreme Court went on to add at para 27 that:

> 'The validity of an agreement of compromise does not generally depend on the validity of any contract it replaces. Nevertheless for it to be a binding contract, the compromise agreement must have been properly concluded.'

[46] The learned judge *a quo* also appropriately referred to a Zimbabwean Supreme Court case[4] in which the nature of a compromise (or *transactio)* was further elaborated in the following terms:

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[3] 2011 (1) NR 262 (SC) at 268 para 21.
[4] *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 138I-139D.

> 'Compromise, or *transactio*, is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something – either diminishing his claim or increasing his liability. The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action. But a compromise induced by fraud, duress, *justus error*, misrepresentation, or some other ground for rescission is voidable at the instance of the aggrieved party, even if made an order of court. Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal.' (Case references omitted.)

The judgment of the court a *quo*

[47] The learned judge *a quo* rejected the argument advanced by Mr Namandje, counsel for the appellant *a quo,* to the effect that through the compromise and defendant's resultant acceptance of liability, the issue whether the claim fell within the ambit of s 10 was irrevocably settled by way of compromise.

[48] The High Court concluded that the Fund did not have the competence to conclude the compromise in respect of the appellant's claim as the compromise did not comply with s 10(1) of the Act. The learned judge *a quo* declared the compromise null and void *ab initio.* The court justified this conclusion on the principle of our law

that a body created by statute may only exercise such power as is granted by the statutory instrument creating it. As the learned judge put it at para 10:

> 'The principle is well-established and clear that a public body created for a particular purpose with statutory powers cannot validly exercise powers not expressly or impliedly authorised *(De Villiers v The Pretoria Municipality,* 1912 T.P.D. 626). The very purpose for which the defendant is constituted is to pay compensation to a person who has suffered loss or damage as contemplated in section 10. By virtue of section 3(1)*(b)* the defendant was given the function "to investigate and settle, subject to this Act, claims arising under section 10." (Original emphasis) It is significant that the defendant is granted the express power to settle claims, in other words, to enter into compromises of claims arising under section 10. By referring to section 10, the power to settle is limited to claims where the claimant is not the driver, or a dependant of the driver, by whose negligence the injury or damage was caused. By incorporating the words 'subject to this Act' any conceivable doubt whether the defendant may settle claims which do not comply with section 10 is, to my mind, removed. Clearly the defendant may not do so. In view of the clear intention conveyed by the express provisions it is not necessary to consider whether such a power is impliedly given. I therefore agree with Mr Ueitele's submission that the defendant did not have the statutory power to enter into the compromise concerning a claim which did not comply with section 10. As such the compromise is null and void *ab initio.*' (Emphasis supplied.)

[49] The appellant seeks to impugn this reasoning on appeal, as I understand it, not so much because the principle stated is wrong, but that it finds no application on the facts of the present case. Mr Namandje argued on behalf of the appellant that the *ultra vires* doctrine ensconced in *Skeleton Coast Safaris Pty) Ltd v Namibia Tender Board and Others*[5] and *Metals Australia Ltd and Another v Amakutuwa and Others*

[5] 1993 NR 288 (HC) at 299J-300A.

finds no application in this case. He argued that if this court accepts the view taken by the court *a quo*, the Fund will never be in a position to compromise any claim. Mr Namandje also argued that absent a denial of the authority of the functionaries who signed the compromise, the Fund was disbarred from resiling from the agreement of compromise.

[50] It is apparent from the manner in which the court a *quo* approached the matter in the written reasons that it assumed, and proceeded from the premise, that it was common cause that the deceased's negligence caused his death. It is necessary to consider if it was not a misdirection for the court to proceed on the basis that it was common cause between the parties in the stated case that the deceased caused his own death. Mr Frank argued in the appeal that it was indeed common cause and Mr Namandje argued that it was not and that, in any event, that was irrelevant because of the compromise which resulted at the initiative of the Fund.

The appellant's submissions on appeal

[51] Mr Namandje argues that the judge *a quo* erred in holding the compromise null and void on the basis that the Fund was not competent to settle a claim based on the allegations that the deceased was the cause of the accident that caused his death. Mr Namandje argued that in so finding the learned judge *a quo* failed to take into account the fact that the Fund, upon receiving the claim from the appellant, initiated the process that resulted in the compromise, representing that its officials would review 'all aspects of the claim, including the evidence and documentation submitted' by the

appellant in support of her claim before settling the matter. Mr Namandje also submitted that the court *a quo* failed to have regard to the fact that the officials of the Fund prepared the document which constituted the compromise and therein stated that it was in 'full and final settlement' and not subject to cancellation or variation unless agreed to in writing by both parties. Mr Namandje also argued that the Fund's claim of lack of competence or capacity is undermined by the fact that it, in the purported letter of cancellation, waives the right to recover the initial N$72 000 paid in furtherance of the compromise. As he put it 'So if it has power to compromise payment made already why could it not compromise future liability to pay the outstanding instalments?'.

[52] Finally, Mr Namandje ominously expressed concern that the result reached by the court *a quo* limits the ability of the Fund to settle any claim in future in circumstances of uncertainty about liability on the merits and that, in addition, it opens the door for the respondent, for tactical reasons, to compromise a claim at a certain time only to renege on it later claiming want of capacity.

[53] Although he does not assign any legal label thereto, in my view, Mr Namandje's submissions raise against the Fund two important principles of our law: *contra preferentem* and *declaration against own interest*, or a combination of the two.

Contra preferentem rule

[54] As Christie aptly remarks:

> 'The *proferens* is the party to the contract who, whether personally or through his agent, is the author of the wording of the contract, and the *rationale* of the *contra preferentem* rule is simply that, if that wording is incurably ambiguous, its author should be the one to suffer because he had it in his power to make his meaning plain.'[6]

Declaration against interest

[55] It is a trite principle of our law that:

> 'A declaration by a person who is still alive, however relevant, is, as a rule, inadmissible; but if he be a party to the action, any statement made by him against his interest can be put in evidence against him as an admission.'[7](My underlining for emphasis.)

The respondent's submissions on appeal

[56] It is not the respondent's case that the Fund may not settle a claim in respect of which it disputes liability. Mr Frank agreed that the result he proposes is in no way intended to preclude the Fund from setting a disputed claim. Thus, the Fund may settle a claim on the merits in order, in the words of this court in *Metals Australia,* 'to put an end to existing litigation or to avoid litigation that is pending or might arise

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[6] R H Christie, *The Law of Contract in South Africa* 5 ed (2006) at 224 and also see *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A).

[7] Edmund Powell et al, Powell's *Principles and Practice of the Law of Evidence* 10 ed (1921) at 265, quoted with approval by Kuper J in *Flange Engineering Co v Elands Steel Mills (Pty) Ltd* 1963 (2) SA 303 at 305G-H.

because of a state of uncertainty between the parties'. The competence to settle a disputed claim must necessarily be implied in the s 10 objects and powers of the creative deed. That concession is properly made, otherwise it would yield the absurd result that the Fund could under no circumstances settle a claim, unless and until it has been found liable by a competent court. Public policy militates against such a result.

[57] That said, the respondent maintains that it is impermissible to read into that object a power to settle a claim that defeats the very essence of the power – to pay claims where injury or death resulted from the negligent conduct of a third party. What sets this case apart, according to the respondent as I understand it, is the fact that the officials of the Fund purported to settle a claim which, the Fund alleges, involved an accident in which the Fund considered the deceased to be the author of his own misfortune and demise. The gravamen of the respondent's opposition to the appeal is premised on the principle of legality, which postulates that all administrative and governmental action must be founded on and be sourced in law.

[58] Therefore, the respondent urges, the appeal must fail because the agreed facts assume that the Fund considered that the deceased was the cause of his own death – a circumstance which makes the Fund not liable in terms of the creative deed.

Just what did the parties state?

[59] Both counsel have accepted that the events leading up to the settlement agreement constitute evidential material alongside the stipulations recorded in their stated case.

[60] The only reference in the body of the stated case to the subject of the cause of the accident is that:

> 'The Defendant alleges the accident was caused by the negligent, unlawful driving of the deceased . . . [in that he] was driving [in] the lane of the oncoming traffic and collided head on with a truck driven by a certain Mr L Jacobs.' (My underlining for emphasis.)

Thereafter it is recorded that:

> 'On the 3rd of October 2006 the Defendant wrote to the Plaintiff and informed her that the Defendant had made a mistake by accepting liability and paying out her claims. The Defendant further informed the Plaintiff that the agreement concluded on 23 January 2006 was a nullity in that it (the Defendant) did not have the power to conclude such an agreement.'

The effect of agreeing to facts in a stated case

[61] Mr Frank argued that the allegations made in the stated case imputing negligence on the deceased must be taken as accepted or as being common cause.

He relies on *Montsisi v Minister van Polisie*[8] where the following, as loosely translated from Afrikaans to English by Mr Frank, is stated:

> 'It seems to me that the parties required the court *a quo* to give its decision on the assumption that the allegations contain
> ed in paras [2] – [5] and 12(11) of the stated case were agreed facts. The case was also argued in this court on that basis'.

[62] It is clear therefore that in *Montsisi* not only was the court satisfied that the facts stated were common cause but that it was argued in the court on that basis. As I will soon show, that is not so in the case before us and, therefore, *Montsisi* does not apply.

[63] The appellant faces an insurmountable obstacle if it is the case that the agreed facts postulated, as proposed by Mr Frank, that it was 'accepted' that the deceased was the author of his own demise. That difficulty becomes the respondent's if it is demonstrated that, faced with whether or not it may at trial establish that the deceased was negligent, the Fund entered into the compromise. As I understand the respondent's argument, a compromise was possible in the latter scenario but not in the first. The Fund has power to settle a disputed claim in the interest of avoiding costly litigation and in circumstances where there is uncertainty as to whether or not it will prevail at trial in due course. The High Court correctly found that to be the case. However, the Fund does not have the power to settle a claim where it is accepted that

[8] 1984 (1) SA 619 (A) at 631D.

the deceased whose death gives rise to the claim was the negligent cause of the accident and, therefore, his death.

[64] Contrary to Mr Namandje's suggestion that the authority of the officials who concluded the settlement agreement was not denied, and that it is irrelevant that the Fund denies liability, the relevant inquiry is when and why the Fund settled the appellant's claim. A valid settlement (compromise) eventuates if it was entered into in order to avoid litigation as contemplated in s 13(4) but not because it mattered not whether the claim was s 10(1) – compliant. That is so because, in the realm of public law, there is a purpose independent of, superior and for that reason indifferent to, the manifested actions of public officials at any given time. That *purpose,* which represents the greater public good and interest, is expressed by the legislature in the objects and functions given to a statutory body or to public officials in the legislation establishing such bodies or vesting power in such officials. Those objects and functions serve as a beacon for the actions of statutory bodies and public officials. If they overstep the boundaries established by the objects and functions, the relevant actions are rendered *ultra vires* and thus liable to review. Similarly, if they fail to perform the functions which under a statute they are required to perform, this entitles aggrieved persons to exact compliance through *mandamus*. In the present case, the all-important purpose is represented by the objects and functions memorialised in ss 3(1)*(b)* and 10(1).

[65] The entire history of the matter is such that it was just as plausible to assume that in framing the stated case in the way the parties did, the appellant was postulating that although not admitting that the deceased caused his own death, that allegation was in any event irrelevant because the matter had already been compromised. Faced with two equally plausible scenarios or interpretations of the stated case, only one of which it considered, the court a *quo* in assuming that it was common cause that the deceased caused his own death gave an unfair advantage to one party instead of seeking to untie the Gordian knot created by the stated case. It is trite that:

> 'The Court will lean to that interpretation which will put an equitable construction upon the contract and will not, unless the intention of the parties is manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other.'[9]

[66] And as succinctly stated by Brand JA in *South African Forestry Co Ltd v York Timbers Ltd:*

> 'While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is very different when a contract is ambiguous. In such a case, the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith'.[10]

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[9] Sir Johannes Wessels *Law of Contract in South Africa* (vol 1, sec 1974) quoted with approval in *Rand Rietfontein Estates Ltd v Cohn* [1937] AD 317 at 330-331.

[10] 2005 (3) SA 323 (SCA) at 340I and also see: *Van Aswegen v Volkskas Bpk* 1960 (3) SA 81 (T) at 85A and *Meskin NO v Anglo-American Corporation of SA Ltd* 1968 and Another (4) SA 793 (W) at 802A.

[67] A consensus between two people entered into seriously and deliberately is an enforceable agreement.[11] Obviously in this case, the compromise was intended to avoid the vagaries of trial. Being an agreement, the legal principles enunciated above apply.

[68] In my view, the agreed facts and the statement of the issue were, at best, ambiguous and, at worst, meaningless. They certainly did not, as contended by Mr Frank, justify the conclusion that it was common cause that the deceased negligently caused his own death. The background to the compromise does not support such a conclusion. That background is that the Fund's officials represented to the appellant that they would investigate the matter and only settle the claim if they were satisfied that it justified settling. In the letter of cancellation, the respondent provides no basis whatsoever why, since concluding the compromise, it came to the conclusion that the deceased was the author of his own demise.

[69] The following submissions by Mr Frank in his written heads of argument constitute a concession that the stated case is ambiguous:

> 'The issue for adjudication agreed to for determination by the Court *a quo* is unfortunately not very clear at all. One issue seems to be contemplated by stating the issue and then an attempt is made to reiterate it in "other words" when a totally different question is posited.'[12] (My underlining for emphasis.)

[11] Compare *Conradie v Rossouw* 1919 AD 279.
[12] Respondent's written submissions dated 18 June 2014, para 11.

[70] At para 16 Mr Frank states:

> '16.1. The question that is initially raised is: Can defendant "escape liability in terms of the settlement by relying on a defence pertaining to the original cause of action".
>
> 16.2. The second question is: Can the defendant "rely on the Motor Vehicle Funds Act, 2001 to escape liability under the settlement agreement" '.

[71] And at para 13 as follows:

> 'It is submitted it is clear from the pleadings and the proceedings in the Court a *quo* that the real question was whether the Fund could rely on the fact that it was not empowered (authorised) under the Act to compensate appellant in circumstances where her ex-husband caused his own death (negligently) to resile from the agreement.'

My finding that the deceased causing his death was not common cause takes the sting out of this argument.

[72] In its stated case, the Fund alleged that the deceased caused his own death. We know not how, when and why that change of heart occurred if regard is had to the document which the Fund itself authored accepting liability – one can safely assume on the basis that they were satisfied at the time that the jurisdictional facts for liability were satisfied. How else can one explain their prior recording in the letter of 19 December 2005 that the Fund would 'investigate all relevant facts and circumstances' before settling? In light of the foregoing, the leap from a denial of liability by the Fund

to ‘acceptance by both parties that the deceased authored his own death’; or the leap from the denial of liability to ‘it was established that the deceased caused his own death’, is most unfortunate. The most that could be said in favour of the Fund is that they retracted the initial acceptance of liability. Even then, the issue remains whether the Fund was entitled to do so. It is noteworthy that the stated case asked the question whether the Fund could escape liability in terms of the settlement agreement by relying on a defence pertaining to the original cause of action. Again, this aspect is overlooked by the majority judgment.

[73] I make no challenge to the court’s finding that the power to compromise claims is limited by necessary implication to claims where ‘the claimant is not the driver, or a dependant of the driver, by whose negligence the injury or damage was caused’. However, I have difficulty with the inference drawn that a mere after-the-fact recording in a stated case that the Fund disputes liability obliterates the prior history of the matter which includes a conscious endeavour and decision by the Fund to, well-knowing what the legal position was, compromise a claim after investigating all the circumstances and evidence relating to it.

[74] The court *a quo* made no attempt at all to examine if there were circumstances, based on the common cause background to the settlement agreement, that would allow the Fund to escape liability. The question posed asked the court to do that very thing. It asked:

> 'Whether the defendant can escape liability in terms of the settlement agreement by relying on a defence pertaining to the original cause of action'.

[75] The fact that we do not know when and how the Fund came to the conclusion that the deceased caused his own death gives poignancy to Mr Namandje's ominous warning that, unless the Fund is held to compromises it makes, there is a danger in the Fund settling claims for tactical reasons only to renege on them for lack of competence if and when circumstances suit it.

[76] In my view, the obvious answer to the first leg of the question posed, in light of the principles governing a compromise, is that the Fund could not escape liability on the basis 'stated', unless it was demonstrable that it was induced by fraud, duress, justus error, misrepresentation or some other ground for rescission such as, as found by the court *a quo*, lack of capacity in the statutory body. That much is conceded by Mr Frank. The onus must of necessity rest on the party who seeks to avoid the compromise, given that by all appearances the compromise was a valid instrument. In determining if it was discharged, the court cannot reasonably ignore all the evidential material against the backdrop of the pleadings as they stood.

[77] It is most undesirable to resolve a matter on a stated case basis where there is more than one possible interpretation of the facts - each of which, if accepted as an established fact, may lead to a different legal conclusion. The court *a quo* could quite properly have rejected to determine the case on a stated case basis and required the parties to lead evidence *a propos* the circumstances that led to the agreement and on

that basis decide if it was void *ab initio*. If the jurisdictional facts for a valid compromise existed, i.e. a disputed but uncertain claim, the compromise would have been valid, but if it was clear to both parties that the deceased was the negligent driver, the compromise was null and void: *cadit quaestio*. Regrettably, the court *a quo* opted to determine the stated case in its imprecise form.

[78] The court *a quo*, as we know, had no regard whatsoever to the history of the matter. I consider that to be misdirection. If it had, it would have had to weigh the allegation of negligence attributed by the Fund to the deceased in the plea and in the stated case against the prior conduct of the Fund. That would, in turn, have required the court to consider whether the after-the-fact denial of liability by the Fund was, in reality, not the kind of circumstance which, under the law relating to compromise, was inexcusable. The allegation that the deceased caused his own death does not stand in isolation. If it did, it would have been safe to proceed on the assumption that in the stated case the parties proceeded on the common cause basis, in view of the Fund's allegation, that the deceased caused his own death.

[79] It occurred to me whether or not the matter was not best remitted to the trial court in view of what I consider to be this ambiguity. I am satisfied though that that is not necessary because:

> 'When a stipulation is capable of two meanings, it should rather be construed in that sense in which it can have some operation than in that in which it cannot have any.'[13]

[13] Robert Joseph Pothier, *A Treatise on Obligations* (1802 EDN) para 92

[80] As Professor Christie argues, and I agree, 'this rule is very much alive in the modern law.'[14] As I will show presently, the ambiguity in the stated case, in my view, provides the basis for the application of the *contra preferentem* rule.

[81] In light of the circumstances leading up to the conclusion of the agreement, it is difficult to reconcile the conclusion reached by the court *a quo* on the question it was asked to answer with the trite principle of our law that a compromise is binding on the parties even though the original contract was invalid or even illegal.

[82] On the facts before us, the *contra preferentem* rule favors the inference that the respondent may have had doubt if the deceased was negligent but chose not to subject itself to the vagaries of a trial. That, it is clearly conceded on behalf of the respondent, would have yielded a valid compromise.

[83] It is impermissible for the Fund to settle by compromise a claim which arises from the unlawful conduct of the claimant or the unlawful conduct of the deceased on whom a claimant was dependent. If it was established that it sought to compromise such a claim, it acted *ultra vires* and the compromise would be null and void *ab initio*. That much is clear from this court's judgment in *Metals Australia*. But that is not what we are faced with here. The respondent by its conduct created the belief that it considered the claim and settled it in order to eschew litigation. That fell within its

[14] Christie, *The Law of Contract in South Africa*. 2006, 5 ed at 220.

competence, i.e. to investigate and settle claims in terms of s 3(1)*(b)*. It has power to settle a claim which may well be doubtful as to its merit but not deserving of protracted litigation. That is a perfectly legitimate incidence of the power given to the Fund under the creative deed.

[84] It is apparent from the initial letter by the Fund that it represented to the appellant that: (a) it was aware that only certain claims are permissible; (b) it in such full awareness resolved to conduct an investigation to determine if the claim fell within the class of claims it was allowed by law to pay; (c) that the documents submitted showed how the accident occurred; and (d) from the evidentiary material it could make an assessment of the *bona fides* of the claim and object if necessary. Further, acting against its own interest, the Fund engaged in the following conduct: (a) it initiated the settlement agreement in which it is said that the terms are in full and final settlement and not susceptible to cancellation or variation without mutual consent; and (b) immediately made partial payment in terms of that agreement.

[85] The historical backdrop to the conclusion of the stated case was, as correctly submitted by Mr Namandje, and with the greatest respect, given no weight at all by the court *a quo* in resolving the critical question it had to resolve as to whether the settlement agreement was a valid compromise untainted by lack of capacity. If the issue was approached in that way rather than in the formulaic fashion of posing the question ‘can a statutory body enter into a compromise to settle a claim involving an accident caused by the deceased driver’, it would have become apparent that the

issue it had to determine was whether, on the facts, the Fund's conduct amounted to a valid compromise. One could not take the denial of liability in the stated case on face value in light of the previous conduct of the Fund. It was important for the court *a quo* to be satisfied, in light of the declarations against interest contained in its letter of 19 December 2005, that the Fund established non-liability based on *ultra vires* from what, by all appearances, was a regular compromise in terms of which it even made part payment and later opted to waive reclaiming it. In light of the agreement and the correspondence preceding it, the true inquiry posed by the stated case was whether the Fund was entitled to avoid the compromise and not whether it can pay a claim not authorised by the creative deed.

[86] The approach taken by the court *a quo* mirrors the very thing a compromise is intended to eschew: you cannot rely on the original defence to avoid a compromise.

[87] What was difficult for the Fund to stipulate in the contract that it was concluding the agreement and making the payments subject thereto that the deceased was not the cause of his own death? All the Fund needed to do in order not to incur liability by default, as contemplated in s 13(2), was to object to the claim. That would have necessitated the appellant initiating legal proceedings, subject to s 13(3) which provides:

> 'No person shall commence legal proceedings against the Fund for the purposes of obtaining compensation under this Act unless –

(a) he or she has lodged a claim which complies with this section; and

(b) a period of 120 days has expired from the date that the claim was delivered or sent to the Fund as prescribed.'

[88] The Fund's failure to do so must lead to the inference that it was satisfied that the deceased did not cause his own death or that they were unable to prove that he had. The allegation that the deceased caused his own death, without it being common cause between the parties, is not a sufficient ground for the conclusion that s 10 of the Act was breached. After all, a compromise is perfectly permissible even where the stipulator is convinced of the hopelessness of the opponent's case as long as it was done in order to avoid litigation.[15]

[89] For all of the above reasons, I find myself in respectful disagreement with the result arrived at by the High Court. I do so, in a nutshell, on the interrelated grounds that the Fund, in regard to the settlement agreement and its content, was *proferens* and engaged in conduct subsequently against its own interest so as to be presumed to have conceded that it settled the appellant's claim in order to avoid litigation – a perfectly legitimate reason for a valid compromise in terms of s 10 read with s 3(1)*(b)* of the Act.

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[15] See *Georgias v Standard Chartered Finance (supra).*

The order

[90] In the result:

1. The appeal is allowed, with costs.

2. The order of the court *a quo* is set aside and substituted for the following order:

> 'The question posed by the parties is answered in favour of the plaintiff and the defendant is ordered to pay to the plaintiff:
>
> (a) The amount of N$77 887,31;
>
> (b) Interest at rate of 20% per annum from date of judgment to date of final payment.
>
> (c) Costs of suit.'

_____

DAMASEB AJA

APPEARANCES

APPELLANT:	S Namandje
	Instructed by Sisa Namandje & Co Inc
RESPONDENT:	T J Frank, SC
	Instructed by Ueitele & Hans Co Inc