IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO:12247/2001

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

28-February-2018

DATE

SIGNATURE

28/2/18

In the matter between:

BILLINGS, CHARMAINE MARY Applicant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

MANAMELA, AJ

Introduction and brief background

[1] The applicant was injured on 20 December 1998 in a motor vehicle collision. She was a passenger in a motor vehicle, which collided with another (unidentified) motor vehicle, on the road between Ladysmith and Collenso. The driver of the motor vehicle in which she was travelling was, reportedly, the sole cause of the collision. The applicant sustained serious bodily injuries, as a result of the collision, including severe head injury. She, reportedly, still presents with cognitive or neurological problems, such as dysarthria. In May 2001, she issued summons against the respondent in terms of the provisions of the Road Accident Fund Act 56 of 1996 for compensation relating to her injuries sustained from the collision or their *sequelae*. The respondent defended the action and denied liability in its plea.

[2] On 19 May 2005, when the matter came up for trial, a draft order, was by agreement between the parties made an order of this Court by Hartzenberg DJP (the 2005 Order).[1] In terms of the 2005 Order, the respondent essentially conceded issues relating to the merits or liability and agreed to compensate the applicant for her proven or agreed damages to a maximum sum of R25 000.00. Issues relating to the *quantum* of the applicant's damages were postponed *sine die*.[2] The amount of R25 000.00 represented the limit or cap in terms of section 18 of Road Accident Fund Act 56 of 1996 (the Old RAF Act).

[3] The limit or cap was effectively removed pursuant to the Constitutional Court decision in the matter of *Mvumvu and Others v Minister of Transport and Another*.[3] In *Mvumvu*, the

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[1] See par [8] below, for the material terms of the 2005 Order.
[2] This suggests that the court would have allowed for a separation of issues relating to merits from issues relating to quantum, as contemplated by Uniform Rule 33(4).
[3] 2011 (5) BCLR 488 (CC); 2011 (2) SA 473 (CC).

Constitutional Court found section 18 of the Old RAF Act inconsistent with the section 9(3)[4] of the Constitution of the Republic of South Africa Act, 1996 (the Constitution) and declared it invalid. The legislature, to its credit, had by then already (and with effect from 1 August 2008), effected some amendments to the Old RAF Act in terms of the Road Accident Fund Amendment Act 19 of 2005 (I will henceforth refer to the legislation as amended as the New RAF Act).[5] The New RAF Act had to be further adjusted after the decision of *Mvumvu*. The statutory adjustments effected by the legislature was in terms of the Road Accident Fund (Transitional Provisions) Act 15 of 2012 (the Transitional Provisions Act),[6] which came into effect on 3 February 2013. The Transitional Provisions Act provides that victims of motor collisions subject to a cap or limit in terms of the provisions of the Old RAF Act, whose claims have "not prescribed or been finally determined by settlement or judgment"[7] upon the advent of the Transitional Provisions Act, were allowed to make an election to recover compensation in terms of the Old RAF Act, lest their claims would be subject to the provisions of the New RAF Act.

[4] As stated above, in terms of the 2005 Order, a determination of the issues relating to the *quantum* of the applicant's damages is still to be made in respect of the applicant's claim, after the indefinite postponement of this part of the trial in 2005. The applicant now seeks

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[4] Section 9 of the Constitution provides in the material part: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth..."

[5] The references "new Act" and "old Act" are contained in section 1 of the Road Accident Fund (Transitional Provisions) Act 15 of 2012 (Transitional Provisions Act). In terms of this legislation "new Act" means the Road Accident Fund Act, 1996 (Act 56 of 1996), as it stood from 1 August 2008 onwards", whereas "old Act" means the Road Accident Fund Act, 1996 (Act 56 of 1996), as it stood prior to 1 August 2008".

[6] See par [11] below, for a reading of the Transitional Provisions Act.

[7] See the definition of "third party" in section 1 of the Transitional Provisions Act.

variation of the 2005 Order in order to remove the R25 000.00 cap or limit imposed by the provisions of the Old RAF Act. It is submitted that as determination of *quantum* or appropriate award for her damages is still pending before this Court, therefore the applicant's claim has not been "finally determined by settlement or judgment", as contemplated by the provisions of the Transitional Provisions Act.[8] The limitation or capping of the applicant's claim will be severely prejudicial to her, particularly considering that section 18 of the Old RAF Act was declared inconsistent with the Constitution, the submission continues. Essentially, the applicant submits that the remaining part of her claim ought to be dealt with in terms of the provisions of the New RAF Act, through a variation of the 2005 order, in as far as, it imposes a limitation for recoverable damages.

[5] The application is unopposed and, therefore, it is by way of request for default judgment. The papers in this application were served on the respondent, directly at its offices in Menlo Park, Pretoria, on 27 March 2017. This is so, despite the respondent having appointed the address of a firm of attorneys for exchange of pleadings and notices in the action.[9] The applicant, as plaintiff in the action, has served notices using the respondent's appointed address. But, for some reason, which I still cannot completely grasp, despite enquiry to counsel in this regard, the applicant's attorneys decided not to serve this application on the respondent's appointed address in the action, but directly on the respondent. This may have further ramifications, but I cannot say there was no proper service on the respondent and I will let nothing turn on this.

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[8] See the definition of "third party" in section 1 of the Transitional Provisions Act.
[9] See notice of intention to defend dated 23 May 2002.

[6] The application came before me in the unopposed motion court on 19 July 2017. However, due to the fact that the issues raised required deeper reflection, I suggested to Ms T Lipshitz, counsel appearing for the applicant, to prepare and file heads to assist in the determination required in the matter. The filing of heads, despite my incessant enquiries was only done on 30 November 2017. But, nevertheless I am grateful to counsel for the heads of argument.

[7] The above brief background will be slightly enhanced by a discussion of the submissions made on behalf of the applicant, as well as, the applicable legal principles, to which I turn, next.

Submissions and applicable legal principles (a discussion)

The 2005 Order

[8] As stated above, issues relating to the merits of the personal injury claim by the applicant against the respondent, were settled in terms of the 2005 Order, granted on 19 May 2005. The material part of the 2005 Order reads:

> "**BY AGREEMENT** between the parties it is ordered that:
>
> 1. The Defendant concedes liability in respect of the Plaintiff's claim, limited to a maximum of R25 000-00 in respect of the proven or agreed special damages;
> 2. The quantum is postponed *sine die*;
> 3. The Defendant pays the Plaintiff's taxed or agreed party and party costs on the merits, including the costs of Counsel on the appropriate Magistrates Court scale."

[underlining added for emphasis]

[9] From the terms of the 2005 Order, reflected above, it is clear that the applicant settled her claim against the respondent for compensation in an amount of not more than R25 000.00, in respect of special damages. Apart from the complaint based on the potential prejudice to the applicant arising from the limit of R25 000.00, the applicant now expresses some misgivings regarding circumstances surrounding the granting of the 2005 Order. She, among others, states that: "*I did not attend the aforementioned court date*[sic]. *I was not aware that the court order limited the quantum of my claim to R25 000.00*".[10] [italics added for emphasis] I will return to this below, particularly regarding the impact thereof on the variation sought by the applicant.

Road Accident Fund Transitional Provisions) Act 15 of 2012

[10] As stated above, the statutory cap of R25 000.00 was removed following the decision of *Mvumvu* on 17 February 2011 by the Constitutional Court, which found sections 18(1)(a)(i), 18(1)(b) and 18(2) of the Old RAF Act, as they read before 1 August 2008 inconsistent with the Constitution and, therefore, invalid. This, ultimately, led to the introduction of the Road Accident Fund (Transitional Provisions) Act 15 of 2012 (the Transitional Provisions Act) on 3 February 2013.[11]

[11] The material part of the Transitional Provisions Act reads as follows:

> "1 ...
>
> In this Act, unless the context indicates otherwise-
>
> **'Fund'** bears the same meaning as defined in the Road Accident Fund Act, 1996 (Act 56 of 1996);
>
> **'new Act'** means the Road Accident Fund Act, 1996 (Act 56 of 1996), as it stood from 1 August 2008 onwards;

[10] See par 12 of the founding affidavit on indexed p 6.
[11] Proc 3 in *GG* 36141 of 8 February 2013.

'old Act' means the Road Accident Fund Act, 1996 (Act 56 of 1996), as it stood prior to 1 August 2008;

...

'third party' means a person who has a right to claim compensation from the Fund in terms of section 17 of the old Act, whose claim is subject to the limitations imposed by section 18 (1) or (2) of that Act, and whose claim has, upon this Act taking effect, not prescribed or been finally determined by settlement or judgment.

2 Transitional arrangements for certain third parties

(1) Unless the third party expressly and unconditionally indicates to the Fund on the prescribed form, within one year of this Act taking effect, to have his or her claim remain subject to the old Act, the claim of such third party is subject to the new Act under the following transitional regime:

(a) Subject to the remaining provisions of this Act, the cause of action of the third party is deemed to have arisen on 1 August 2008 for purposes of section 12of the Road Accident Fund Amendment Act, 2005 (Act 19 of 2005), and section 17 (4A) *(b)* of the new Act.

(b) The right of the third party to claim compensation for non-pecuniary loss is limited to a maximum amount of R25 000, unless-

(i) the third party submits a serious injury assessment report as contemplated in Regulation 3 of the Road Accident Fund Regulations, 2008, indicating a serious injury, within two years of this Act taking effect; and

(ii) it is determined in accordance with Regulation 3 of the Road Accident Fund Regulations, 2008, that the third party suffered a serious injury... "

[underlining added for emphasis]

Analysis

[12] In terms of the definition of "third party" in the Transitional Provisions Act, quoted above, a claimant, like the applicant in this matter, whose claim was subject to the limitations imposed in terms of section 18 of the Old RAF Act, will continue without those limitations in terms of the New RAF Act, provided the claim has not prescribed or been finally determined by settlement or judgment as at 3 February 2013, being the date on which the Transitional Provisions Act took effect. Those qualifying claimants or third parties had to make an election (by "expressly and unconditionally" indicating to the Fund (the respondent herein) on the

prescribed form) within one year of the Transitional Provisions Act taking effect to have his or her claim to remain subject to the Old RAF Act, otherwise their claims will be determined in terms of the provisions of the New RAF Act.

[13] The 2005 Order created an impediment for the applicant. It limited the plaintiff's claim for compensation in respect of special damages up to R25 000.00. The applicant submits, in terms of the current application, that the limitation of her claim will be severely prejudicial to her and also inimical of the declaration of inconsistency by the Constitutional Court in the decision of *Mvumvu*. She also submits that her claim against the respondent has not been finally determined by settlement or judgment (as contemplated by the provisions of the Transitional Provisions Act) and, therefore, it is still pending before this Court for determination of issues relating to *quantum*. However, the provisions of the Transitional Provisions Act, particularly the removal of the limitations of the Old RAF Act by the New RAF Act, will not find application to the applicant's claim in the existence of the 2005 Order. Evidently, the applicant is alive to this reality, hence this application for variation of part of the 2005 Order.

[14] It is not stated under which Uniform Rule of this Court or law the applicant submits the variation of the 2005 Order is permissible. It is a generally well-established rule of our courts that, once a court has made a final judgment or order, it becomes *functus officio* and, no authority to correct, alter or supplement the judgment or order, due to the principle of finality of judgments, save in terms of the specific circumstances provided for in terms of the Rules or the common law.[12] In terms of the Full Court decision of this Division in *De Wet and Others v*

[12] See *Erasmus Superior Court Practice*, 2nd edition, at RS 5, 2017, D1-563.

Western Bank Ltd,[13]the following are the generally accepted ways in terms of which judgment, particularly default judgement, can be set aside in the High Court: Uniform Rule 31(2)(b); Uniform Rule 42(1) and the common law.[14] In a quest to determine the applicable rule or legal principle, I will briefly discuss the three ways, next.

[15] Rule 42 of the Uniform Rules of this Court reads in the material part:

> "(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
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> *(a)* An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> *(b)* an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> *(c)* an order or judgment granted as the result of a mistake common to the parties.
>
> (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
>
> (3) ..."

[16] Rule 42 is considered "a procedural step designed to correct expeditiously an obviously wrong judgment or order".[15] From the above, it is clear that Rule 42 provides for rescission or variation of judgments or orders on the bases of three broad categories or instances. Firstly, where the order or judgment was erroneously sought or erroneously granted in the absence of an affected party. Secondly, where the particular order or judgment has an ambiguity, patent error or omission. And thirdly, where the judgment or order was granted as a result of a mistake

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[13] 1977 (4) SA 770 (T) at p 776D-H.

[14] See *De Wet v Western Bank* at p 776D-E.

[15] See *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C). See also *First National Bank of Southern Africa Ltd v Van Rensburg NO and Others: In re First National Bank of Southern Africa Ltd v Jurgens and Others* 1994 (1) SA 677 (T) at 681C).

common to the parties. I do not find any of these instances or categories applicable to the this matter. Although, the applicant submits that she did not attend court on the day the 2005 Order was granted and was not aware that the *quantum* of her claim was limited to R25 000.00 in terms of the 2005 Order, which presumably allude to the either the absence of accountability or instructions on the part of her erstwhile attorneys, this cannot serve as a basis for rescission of the order in terms of Rule 42. The applicant was clearly represented in court by counsel, ostensibly acting on instructions from attorneys when the 2005 Order was made on 19 May 2005. The applicant has instructed her erstwhile attorneys as far back as 18 May 2001, to institute action against the respondent for compensation for injuries sustained in the collision.[16] It is trite that as at 19 May 2005, the respondent applicant's claim was limited to an amount of R25 000.00. Therefore, whether the applicant attended court or was aware or not of the limitation is of no consequence for current purposes. There was no other legal basis to fix the extent of the applicant's claim that on the basis stated in the 2005 Order.

[17] In my view, the inclusion of the words "limited to a maximum of R25 000.00 in respect of the proven or agreed special damages", which the applicant seeks to excise from the 2005 Order, does not necessarily remove the statutory limitation prevailing at the time the impugned order was made. It merely stated or confirmed the category of the applicant's claim, in terms of the legislative provisions which prevailed at the time. What really matters is the existence of the impugned order. In other words, whether the disposal of the issues relating to the merits of the applicant's claim in terms of the 2005 Order, constitutes final settlement or final judgment, in respect of the applicant's claim, as contemplated by the Transitional Provisions Act. This, is the determination, that, ultimately, is to be made regarding the applicant's claim

[16] See par 10 of the founding affidavit on indexed page 6.

against the respondent. I am aware that ultimately there will be a need to vary the 2005 Order, hence I continue the discussion of possible ways in terms of the Rule 31 or the common law.

[18] In terms of Rule 31, for an applicant for rescission of judgment granted against him or her to be successful, such applicant have to show good cause. Showing good cause means such applicant ought to give a reasonable explanation for his or her default; show that rescission was brought *bona fide;* that they have a *bona fide* defence, including a prima facie case on the merits. In *Silber v Ozen Wholesalers (Pty) Ltd*[17] it was held that "good cause" includes the existence of a substantial defence, but is not limited thereto. The substantial defence has to exist against a *bona fide* presently held desire to raise such a defence once the judgment is rescinded.[18] There also ought to be an explanation for the default. The court, seized with a rescission application, may interfere with the exercise of a discretionary power of the court which granted the impugned order or judgment, only if that power has not been properly exercised.[19] Rule 31 reads, as follows, in the material part:

> "(1) ...
> 2) *(a)* Whenever in an action the claim ... is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.
> *(b)* A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

[17] 1954 (2) SA 345 (A) at 352G.
[18] See *Galp v Tansley NO* 1966 (4) SA 555 (C) at 560B; *Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462 (W) at 464H-I.
[19] See *Ferris and another* v *Firstrand Bank LTD* 2014 (3) SA 39 (CC) at paras [23]- [27]; parallel reporting under 2014 (3) BCLR 321 (CC) 329-330 at paras [23]- [27].

[19] But, the 2005 Order, having been granted by agreement between the parties, is not a default judgment contemplated by Rule 31(2)(b), quoted above. It was granted by agreement between the parties at a trial, which presumably was the result of a proper notice of set down. This is so, despite the misgivings by the applicant already dealt with above. Therefore, Rule 31 is also not applicable to this application.

[20] Now to the common law. According to the learned authors of *Erasmus Superior Court Practice*,[20] judgment can be set aside at common law on the grounds of fraud; *justus error*; in certain exceptional circumstances when new documents have been discovered; where judgment had been granted by default; and in the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa causa*.[21] The following *dicta*, from the decision of *De Wet v Western Bank* may explain this further:

> "Before a judgment would be set aside under the common law, an applicant would have to establish a ground on which *restitutio in integrum* would be granted by our law such as fraud or *justus error* in certain circumstances…
>
> Under the common law a judgment can be altered or set aside only under limited circumstances and the additional relief extended by the Rules of Court is intended to modify such rigid provisions but within the confines of such Rules. The Court is empowered to grant relief in certain additional circumscribed circumstances."[22]

[quoted without accompanying citations or authorities]

[20] 2nd edition.
[21] See *Erasmus* at RS 5, 2017, D1-563.
[22] See *De Wet v Western Bank* at p 776F-H.

[21] In the decision of *De Wet v Western Bank* it was submitted that, ultimately on appeal a court "has a residual inherent jurisdiction to set aside the judgment by means of which it holds the scales of justice where no specific law or rule exists to cover the particular circumstances of the case".[23] But, although the court stated that it has inherent power to control its procedure and proceedings, the court held that that does not necessarily give the court the right to interfere with the principle of finality of judgments, other than in circumstances specifically provided for in the Uniform Rules or at common law.[24]

[22] The submissions made by the applicant as grounds for this Court to vary the 2005 Order can be summarised as follows. The applicant did not attend court on 19 May 2005, when the impugned order was made. She was not aware that the impugned order limited the *quantum* of her claim to R25 000.00. Between 19 May 2005 and 26 March 2016 no offer was received from the respondent in respect of the *quantum* of her claim. On 26 March 2016, the applicant consulted with a new firm of attorneys to represent her in the claim against the respondent. On 10 March 2015, she had terminated her mandate to her erstwhile attorneys. She was advised by her new attorneys that settlement of her claim was received from the respondent in an amount of R25 000.00 on 15 December 2015. Investigations had to take place regarding the progress in the matter in order to determine why the respondent make such a limited offer, which investigations revealed a copy of the 2005 Order. Her new attorneys contacted her erstwhile attorneys in order to determine what transpired at court on 19 May 2005, but was told the attorney who handled this matter is no longer in the employ of those attorneys and that there are no notes in the file indicating what transpired in the matter. The applicant further

[23] See *De Wet v Western Bank* at pp 780-781.
[24] *Ibid.*

submits that she does not recall ever discussing the impugned order with her former attorneys and have never given instructions in accordance with the 2005 Order.

[23] The applicant clearly suggests that her former attorneys did not conduct themselves in a manner that is to be expected of members of their profession and officers of this Court. She alleges that they attended court and entered into a settlement agreement without discussing it with her. This also means that they have never explained to her from the moment she instructed them on 18 May 2001 until 19 May 2005 that her claim against the respondent was limited. I find totally incredible. Further the applicant appears to have been disinterested in her matter between May 2001 and March 2016. This is not acceptable for a litigant.

[24] Further, as stated above, the applicant does not state what instructions she would have given to her erstwhile attorneys if she was alerted of the trial in 2005. No one, including the applicant herself and her erstwhile attorneys would have predicted that there will be a change in statutory provision and therefore that a settlement limited to an amount of R25 000,00 would have constituted bad advice on the part of the attorneys. This means that the conduct of the attorneys or even the historical aspect of this matter is not really relevant for determination to be made, but whether the 2005 Order poses an impediment to the applicant's claim.

Was the 2005 order a final judgement in respect of the applicant's claim?

[25] The Transitional Provisions Act does not define or explain what is meant by "final settlement" or "a final judgment". I also, could not come across a decided case on this, and

equally so, the heads of argument by counsel do not deal with this. Therefore, what constitutes final settlement or final judgment will be dealt with in a circular fashion.

[26] As stated above, it appears that the court ordered the separation of the determination of issues relating to merits from issues relating to *quantum* of the applicant claim. This was presumably in terms of Rule 33(4) of the Uniform Rules of this Court. Rule 33 reads in the material part:

> "(4) If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.
>
> (5) When giving its decision upon any question in terms of this rule the court may give <u>such judgment</u> as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the <u>final disposal thereof</u>."

[Underlining added for emphasis]

[27] From what is reflected above, Rule 33(5) contains the word "judgment". However, the Rules do not appear to define what is meant by judgment. However, the usage or employment in Rule 33(5) appears to suggests that in matters where separation is ordered, judgment may be given "upon any question" in terms of which the separation was ordered. This, in my view, suggests the possibility of more than one judgment in the same matter. This view appears to be shared by the learned authors of *Erasmus Superior Court Practice* in the following paragraph:

"It has been held that the effect of an order that the merits and *quantum* be decided separately, is that the issues on the pleadings would be resolved in two separate and self-contained trials, and that an order made by the court after the first trial (for example issues other than *quantum*) was a final decision, definitive of the rights of the parties and appealable, in respect of which the court was *functus officio*."[25]

[quoted without accompanying authorities]

[28] In *David Hersch Organisation (Pty) Ltd and Another v Absa Insurance Brokers (Pty) Ltd*[26] Southwood J stated the following relying on the authorities stated thereto:

"The effect of the order made in terms of Rule 33(4) was that the issues on the pleadings would be resolved in two separate and self-contained trials. See *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 408H--I and 408B--C. The order made by Sutherland AJ after the hearing on the issues other than *quantum* was a final decision (ie it could not be corrected or altered or set aside by the trial Judge at a later stage of the trial) and it was (or should have been) definitive of the rights of the parties. See *SA Eagle Versekeringsmaatskappy Bpk v Harford (supra* at 789B and 792C--H); *Marsay v Dilley* 1992 (3) SA 944 (A) at 962C--H; *Schmidt Plant Hire (Pty) Ltd v Pedrelli (supra* at 407A--D). As a final decision, the order was appealable. See *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 583H--I; *SA Eagle Versekeringsmaatskappy Bpk v Harford (supra* at 792H); *Marsay v Dilley (supra* at 962C--E)."[27]

[29] On the basis of the above, I consider settled the issue whether or not the 2005 Order constitute a judgment. However, this does not answer the question whether same was a final judgment as contemplated by the provisions of the Transitional Provisions Act. To determine

[25] See *Erasmus Superior Court practice* at OS, 2015, D1-439.
[26] 1998 (4) SA 783 (T).
[27] See *David Hersch Organisation v Absa Insurance Brokers* at p 787c-e.

this, I will employ the tools of interpretation suggested in the decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[28] that "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production." [quoted without references, but with added underlining]

[30] Therefore, in order to determine the grammatical meaning of the words "final judgement" in terms of the above *dicta* from *Endumeni*, I will use the dictionary meaning of the words. In terms of the *Compact Oxford Dictionary Thesaurus & Wordpower Guide*[29] the word "final" means: "**adj.1** coming at the end; last. **2** allowing no further doubt or dispute… **n.1** the last game in a tournament, which will decide the overall winner…" Therefore, the reference to "a final judgment" in the Transitional Provisions Act, in my view, refers to the judgment which will "come at the end" of be "last" in the judgments or orders of a particular court seized with the matter, where there is more than one judgment or in case of a single judgment, that judgment that is made at the end of the matter. The 2005 Order was not made at the end of the matter and is, therefore, not the last the judgments potentially to be made in this matter, as it only related to issues relating to merits of the applicant's claim.

[28] 2012(4) SA 593 (SCA) and [2012] 2 All SA 262 (SCA) at para [18]. *Endumeni* was followed in various other decisions including in the Constitutional Court of *Kwazulu-Natal Joint Liaison Committee* v *Member of the Executive Council, Department of Education, KwaZulu-Natal and others (Centre for Child Law as amicus curiae)* 2013 (6) BCLR 615 (CC) on p 651 at para 129.
[29] (2001) Oxford University Press, New York.

[31] Be that as it may, the matter is not fully decided on this aspect. Whether the 2005 Order constitutes a final judgment, does that address the issues that the 2005 Order came into being due to an agreement reached between the parties. The question that has to be addressed is whether the variation of an order made consequent to an agreement between the parties is capable of variation by the court bearing in mind the cornerstones of our law contract, which include freedom of contract and the sanctity of contract.

[32] But, in my view, I do not have to decide the issue of variation of a settlement agreement between the parties. The material issue to determine in this matter is whether reference to the limitation of the claim to R25 000.00 was something that was specifically agreed upon by the parties. In my view, the reference was merely made to record the existing legislative provision at the time and specifically to categorise the applicant's claim as a limited claim. It does not appear that the inclusion of the statutory limit prevailing at the time was essential element of the agreement between the parties, but rather just confirming, out of abundance of caution, that the applicant's claim is a limited claim. This, in my view, is logical since, at that time in 2005, no one, including the parties themselves, anticipated that the statutory limitation will be removed. In other words, it does not appear from the facts of this matter that either of the parties will have had the necessary intention to settle the matter in the manner only if the words or limitation of R25 000.00 is included beyond what was provided or independent of section 18 of the Old RAF Act.

[33] Therefore, I come to the conclusion that, the impugned order is not necessarily the agreement between the parties. I am of a further view that same can be rescinded as part of the order made by the court. However, from what is stated above the Uniform Rules of this Court

and the common law, do not allow this Court to just vary judgements due to the principle of finality judgments, save in the instances as stipulated in the rules. However, as indicated above, there could be circumstances under which deviation is possible from the stipulations of the rules. I consider deviation necessary in this matter in the interests of justice. Therefore, the 2005 Order will be varied in terms of the notice of motion and the applicant's claim will proceed in terms of New RAF Act.

Order

[34] For the abovementioned reasons, the following order is granted:

a) the order of this Court granted on 19 May 2005 by Hartzenberg DJP is varied by deletion of the following words from paragraph 1 thereof: "limited to a maximum of R25 000-00 in respect of the proven or agreed special damages";

b) save as stated in a) hereof, the remainder of the order of this Court granted on 19 May 2005 by Hartzenberg DJP remains unaffected by this order.

K. La M. Manamela

Acting Judge of the High Court

28 February 2018

Appearances:

For the Applicant	:	Ms T Lipshitz
Instructed by	:	Swartz Attorneys c/o Friedland Hart Solomon & Nicolson Monument Park, Pretoria
For the Respondent	:	No appearance (Default Judgment)