

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

Reportable

APPEAL CASE NO: HCAA07/2016
COURT A QUO CASE NO: 1386/2015

In the matter between:

MASWANGANYI, PATRONACIA THEMBI
OBO MACHIMANE, TEBOGO MAIMELE

APPELLANT

and

ROAD ACCIDENT FUND

RESPONDENT

APPEAL JUDGEMENT

MULLER J:

[1] The appellant issued an application in terms whereof the following relief were claimed:

(a) Calling off the part-heard trial in the matter which

commenced on Wednesday 14 September 2016 and

postponed for continuation on Wednesday 12 October 2016

at 10h00 in the forenoon.

- (b) That the said trial be and is hereby forthwith annulled.
- (c) Declaring that the l/s between the applicant and the respondent which was to be the subject matter of the trial which was to commence on Wednesday 14 September 2016 at 10h00 in the forenoon before this court under case number 1386/2015 to have been fully and finally settled between the parties in terms of the agreement and resultant draft order made and prepared by the parties and bearing the same date of Wednesday 14 September 2016.
- (d) That the draft order in para C above is hereby made an order of the Court.
- (e) That the costs payable by the defendant in terms of paragraph C of the said draft order shall include travelling costs, the costs of this application and the hearing of Wednesday 12 September 2016, as well as the costs of senior counsel where employed.
- (f) Further and /or alternative relief.
- [2] To fully understand the unusual relief claimed in the notice of motion the background leading to the application being launched must briefly be set out. The following facts are common cause:
- (a) action was instituted on behalf of a minor against the Road Accident Fund which was set down for trial on 12 September 2016.
- (b) the trial was allocated to the learned deputy judge president on 14 September 2016.
- (c) when the matter was called the parties requested the trial to stand down to discuss settlement thereof.

- (d) when the matter was called again later that day the learned judge was informed by both counsel appearing for the parties that a settlement had been reached.
- (e) a draft order which contained their agreement was handed up.
- (f) the learned judge indicated after receipt of the draft order that she is not satisfied with its contents, more particularly, with the liability of respondent being a hundred percent.
- (g) she indicated to counsel that when she prepared for the trial she had sight of the pleadings and witness statements filed and requires evidence to be adduced.
- (h) the plaintiff called a witness Mahlenhle David Maake.
- (i) the trial was postponed *sine die* before conclusion of his evidence.
- (j) the appellant then launched a substantive application in which the relief referred to in this judgement was claimed.
- (k) on 12 September 2016 counsel approached the learned deputy judge president in chambers. Two suggestions were made to her:
- (i) that the learned judge call off and annul the part-heard trial proceedings before her and make the draft an order of court, adjusted in accordance with the relief listed in the said application; or
- (ii) alternatively, to hear the application and pronounce judgment on the application.
- (l) the learned deputy judge president elected to proceed with the application and commenced with argument.
- (m) after argument was concluded the learned deputy judge president dismissed the application with costs.
- (n) leave to appeal to the full court of this division was granted.

[4] It is practice, and it is a practice that is certainly to be encouraged, that parties settle their disputes out of court where possible. A *transactio* is a substantive contract entered into with the object of preventing avoidance or terminating litigation and has the effect of *res judicata*. See *Gollach & Gomperts (1967) Pty Ltd v Universal Mills of Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A)* at 921D and 922B. It is possible, and it often happens, that the parties in litigation settle their dispute on the steps of the court. However, in this instance the court was, after having regard to witness statements contained in the court file, of the view that the parties should adduce evidence notwithstanding being informed by the parties that they entered into a contract of settlement.

[3] The appeal is mainly against the dismissal of the main relief that the parties had been settled. There is, therefore, in my judgment, no need to decide whether the court ought not to have taken cognizance of the witness statements in the court file or that the order to continue with the trial, despite the settlement, was correct. The appeal before us is not against that order. See *Cape Empowerment Trust v Fisher Hoffman Sithole 2013 (5) SA 183 (SCA)* at par 39. The learned deputy judge president, was called upon in the motion proceedings, to reconsider her earlier decision and to declare her order to continue with the trial after some evidence had been adduced, a nullity. The decision to continue with the trial and to hear evidence, despite a settlement between the parties are the underlying facts upon which the application before the deputy judge president is founded.

[6] A settlement, if the argument of the appellant is correct, will bring an end to the proceedings the moment it is concluded. The court, therefore, will be deprived of jurisdiction to make the settlement an order of court. The argument is unsustainable in the light of clear authority to the contrary. There is no suggestion that the court had no jurisdiction when the summons was served and when trial commenced.

[5] Mr Shakoane SC, who appeared for the appellant, in supplementary heads of argument filed at the request of the court, argued that the order is void as the court proceedings have been terminated before conclusion of the trial by reason of the settlement. He contended that the process of annulment may vary depending on the reason for the annulment. He argued that the order is void due to the lack of jurisdiction. He relied on *Communication Worker Union v Telkom SA Ltd* 1999 (2) SA 586 (TPD) at 593F-599B. This case is of no assistance to the appellant. The court, in that case, was called upon to review and set aside a decision by the respondent to demote certain employees and to declare them entitled to all benefits. The respondent objected to the jurisdiction of the court at the commencement of the proceedings. Southwood J, with respect, correctly held that a court must have jurisdiction for its judgment or order to be valid. The learned Judge expressed himself as follows at 593H-J:

"The crucial time for determining whether a court has jurisdiction is the time when proceedings are commenced and, once jurisdiction is established it continues to exist to the end of the proceedings even though the grounds upon which it was established has ceased to exist: *Thermo Radiant Oven Sales (Pty) v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 310D. For purposes of the objection it must be established therefore whether this Court had jurisdiction when the proceedings commenced, ie when the application was served on the respondents."

[7] I consider it necessary also to mention in passing that a court, as the upper guardian of all minor children, should not act as a mere rubber stamp of the parties. It is indeed obliged in terms of the common law to approve a proposed settlement. It is usual that where a minor is awarded damages that the money be paid into the Guardian's Fund or that a *curator bonis* be appointed with power to invest the money until the child attains majority. See *Ex Parte Visser NO in Re Khoza* 2001 (3) SA 524 (TPD) at 527H-I; *Ex Parte Bloy* 1984 (2) SA 410 (N) at 413A. Provisions along those lines are absent from the proposed draft order presented to the learned judge.

[8] The proceedings before the deputy judge president have not been concluded and are still pending. A court, which is seized with the action may exercise its inherent power to protect and regulate its own process. See also *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 735 (A) at 754G-H. In terms of section 173 of the Constitution, a court, in addition to the aforesaid power, has the power to develop the common law, if it is in the interests of justice.

[9] However, as I see it, the learned deputy judge president was called upon to review her own decision in the motion application. The primary means to correct a judicial error by a judge who has made a final decision, leaving aside an order granted *ex parte* by a judge which may be corrected by another single judge through the ordinary processes of court, is by way of an appeal to a higher court.

[10] In *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 SCA at para 35 Schutz JA said:

"Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality, at the administration of the 'law which has been passed by the Legislature' as Bell J put it on the same page of McIntyre's case. And throughout it has been the High Court, and only the High Court, acting through its Judges, that has enjoyed the general, inherent jurisdiction to entertain reviews. It is not itself subject of review – see the cases cited in para [29]. There are other means, quite sufficient means, to which I will come, by which the judgement of a Judge may be corrected."

[11] Courts are subject to the rule of law on which our constitutional dispensation rests. Section 2 of the Constitution regulates all public power. When judges erred in the performance of their judicial duties the subject affected by the defective order has the right to be afforded a proper hearing by means of an appeal on whether the order should be set aside. Proper process must be followed to set court orders aside because they, even if defective, have legal consequences. See *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) at par 74.

[12] It is, of course, open to an appellant to raise in an appeal the grounds which would have been grounds for review in another tribunal. Section

16(1)(a)(i) of the Superior Courts Act 10 of 2013 states:

"Subject to section 15(1) of the Constitution and any other law-
(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted-

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on

the direction issued in terms of section 17(6);"

There can be no doubt that no other process than an appeal is prescribed if a party is dissatisfied with a final decision of a high court in a civil case.

[13] This court may only do what the law permits. Such a process, where hitherto none existed, will, create uncertainty and confusion which will have a profoundly negative effect on the orderly administration of justice. It will render section 16 of the Superior Court Act and the fair trial rights contained in section 34 of the Constitution, nugatory.

[14] Because of the view I have taken of the appeal, I need say no more than that it is unwise to comment on whether the learned deputy judge president was correct or not in approaching the matter the way she did.

[15] The appeal falls to be dismissed. The appeal is not opposed and therefore no costs order is warranted.

ORDER:

The appeal is dismissed.

M.V. SEMENYA
JUDGE OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE

I concur

M.G. PHATUDI
JUDGE OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE

I concur

G.C. MULLER
JUDGE OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE

APPEARANCES

For Appellant:
For Respondent:
Date heard:
Date of judgement:

G. Shakoane SC
No appearances
21 April 2017
19 May 2017