

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA JUDGMENT

Not Reportable

Case no: 711/2023

In the matter between:

UBISI, MK

FIRST APPELLANT

NEL, VAN DER MERWE & SMALMAN INC

SECOND APPELLANT

and

ROAD ACCIDENT FUND

RESPONDENT

Neutral citation: *Ubisi and Another v Road Accident Fund* (711/2023) [2024]
ZASCA 93 (11 June 2024)

Coram: MABINDLA-BOQWANA and MOLEFE JJA and BAARTMAN AJA

Heard: 13 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court of Appeal website and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 11 June 2024

Summary: Practice and procedure – settlement agreement of claim against the Road Accident Fund – irregular and improper setting aside of settlement agreement by the high court – court improperly making adverse findings against legal practitioners.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mbongwe J, sitting as court of first instance):

- 1 The appeal is upheld.
- 2 The order of the high court is set aside and is replaced with the following:

‘The draft order marked “X” is made an order of court.’
- 3 There is no order as to costs.

JUDGMENT

Molefe JA (Mabindla-Boqwana JA and Baartman AJA concurring):

[1] This appeal deals with the powers of a court when parties have settled their dispute, without proceeding to litigation. It is against the order granted by the Gauteng Division of the High Court, Pretoria, (the high court) in respect of an action brought by the first appellant, Mr Matedewuja Kenneth Ubisi, against the respondent, the Road Accident Fund (the RAF).¹

[2] The high court set aside a settlement agreement concluded between the parties. It further ordered Mr Ubisi’s attorneys, Nel, van der Merwe and Smalman Incorporated (Smalman Inc), to pay the costs of the action, including costs of Mr Ubisi’s experts, *de bonis propriis*. Mr Ubisi applied for leave to appeal against the order, which the high court refused. The appellants were granted leave to appeal by

¹ The Road Accident Fund is an organ of state created in terms of s 2(1) of the Road Accident Fund Act 56 of 1996.

this Court. Smalman Inc are the second appellant because of parts of the order granted against them by the high court. The RAF does not oppose the present appeal and filed a notice to abide on 10 May 2024.

[3] On 15 September 2017, Mr Ubisi issued summons against the RAF in the high court for a claim of R9 500 000. He alleged that he had sustained injuries in a motor vehicle accident, which entitled him to compensation for past and future medical expenses, past and future loss of earnings and general damages. The RAF filed a plea and disputed liability and the quantum of the claim. Liability was subsequently settled between the parties on 5 June 2019 and the RAF agreed to compensate Mr Ubisi for 100% of his proven or agreed damages.

[4] The matter was set down for hearing in respect of quantum on 25 November 2021 before Mbongwe J. On the day of the hearing, the RAF sent an offer of settlement in respect of quantum to Smalman Inc. The offer was made in respect of general damages, loss of earnings and an undertaking in respect of future medical expenses and costs. The determination of quantum for past hospital and medical expenses was to be postponed *sine die*. On 16 February 2022, Smalman Inc accepted the offer on Mr Ubisi's behalf by way of notice of acceptance and prepared a draft order dated 6 May 2022, containing the settlement agreement. On 6 May 2022, the RAF consented to the draft order being made an order of court.

[5] The relevant terms of the agreement were as follows:

'Merits: 100% in favour of the Plaintiff.

General damages: R500 000.00

Add: Loss of earnings: R 2 049 830,20

Future medical expenses: Undertaking sec 17(4)(a) 0% limitation

Cost Contribution: Taxed – High Court

TOTAL: R2 549 830.20'.

The matter was placed on the settlement roll and heard by the high court on 5 June 2022. Mr Ubisi's counsel requested the court to make the settlement agreement an order of court as agreed by the parties.

[6] The high court indicated that it was not a rubber stamp of settlement agreements; it had to interrogate such offers. It further stated that it had to have oversight on these matters and was not prepared to simply grant an order because the parties had concluded a settlement agreement. The court also indicated to the parties that it was not satisfied with the amount agreed in respect of general damages, loss of earnings and the terms of the draft order. It reserved judgment to consider the proposed settlement. The court was in possession of the court file which contained pleadings, Mr Ubisi's expert reports from an industrial psychologist, occupational therapist, orthopaedic surgeon, ophthalmologist and actuary.

[7] On 1 August 2022, the high court handed down a written judgment with the following order:

'1. *The settlement agreement* between the parties for the payment to the plaintiff's attorneys of the amount of R2 549 830.20 by the defendant *is hereby set aside*, save in respect of the section 17(4) undertaking.

2. The defendant is ordered to issue and furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act.

3. All costs including the costs for the services rendered by the plaintiff's experts, are to be paid by the plaintiff's attorneys *de bonis propriis*.

4. The registrar is to cause a copy of this judgment to be served on the Chief Executive Officer of the RAF for the investigation of the impugned part of the settlement of the claim and taking of appropriate action as he may deem fit.

5. A further copy of this judgment and a transcript of the record of the proceedings is to be served on the Legal Practice Council for the investigations of the conduct of counsel at the hearing and of the plaintiff's attorney regarding pursuance of the impugned parts of the plaintiff's claim.' (Emphasis added.)

[8] In its judgment, the high court found that some of the terms of the settlement agreement were at odds with the report made by Mr Ubisi's industrial psychologist. According to the court, the industrial psychologist had stated in her report, that Mr Ubisi had progressed in 2017 from his pre-accident position of underground mine supervisor to section manager. The report also referred to the information obtained from Mr Ubisi's senior and mine manager that, after the accident, he noticed that 'the claimant struggled a bit, however it seem[ed] that he has recovered and it d[id] not seem that he ha[d] any negative effects from the injuries sustained from the accident'. The high court found that the industrial psychologist's report confined Mr Ubisi to his pre-accident position at work and improperly qualified him for past and future loss of earnings. The court refused to award the agreed quantum of damages in respect of loss of earnings of R2 049 830.20, on the basis that the RAF tender was not justified.

[9] The high court also refused to award the R500 000 tendered for general damages on the basis that Mr Ubisi's general practitioner, Dr J Schuttle, confirmed in his report that his whole person impairment (WPI) was 12% and below the 30% threshold, which was a clear indication that he did not qualify for general damages. The high court found that the tendered amount was not justified and was to the prejudice of the RAF and the public purse. The claim for payment of past hospital and medical expenses, although the parties had agreed that the determination of the quantum of this claim should be postponed, was effectively dismissed.

[10] Counsel for Mr Ubisi submitted that, firstly, the high court was not justified, on the material before it, to make a finding that Mr Ubisi was not entitled to payment of any general damages, loss of income, past hospital and medical expenses and costs. It is only in circumstances where the agreement contains terms which are unconscionable, illegal and immoral, that the court can refuse to make the settlement agreement an order of court. It was argued that all the requirements set

out in *Eke v Parson (Eke)*,² namely, that: (a) the agreement was related directly or indirectly to the dispute or *lis* between the parties; (b) it was not objectionable in that it must accord with the Constitution and the law and not be offensive to public policy; and (c) it held some practical and legitimate advantage, had been met. The appropriate relief was, therefore, to make the draft order agreed to by the parties an order of court.

[11] Secondly, by entering into a settlement agreement, the parties had brought the *lis* before the court to an end. Neither party challenged the validity of the settlement agreement, which rendered the settled issues *res judicata*. The high court, accordingly, lacked jurisdiction to set aside the settlement agreement. Whether the settlement was valid was not an issue before the high court. Thirdly, the high court set aside the settlement agreement on the grounds of fraud, without any evidence to support such a finding. It made adverse findings of dishonesty and fraud against Mr Ubisi's attorney and counsel without affording them an opportunity to be heard on the matter.

[12] I now consider the circumstances in this case to determine whether the judge was entitled to set aside the settlement agreement. The legal position on how a court should deal with a settlement agreement brought by the parties to be made an order of court, was recently settled by the Constitutional Court in *Mafisa v Road Accident Fund (Mafisa)*,³ where it was stated that '[c]ontractual agreements concluded freely and voluntarily by the parties ought to be respected and enforced. This is in accordance with the established principle *pacta sunt servanda* (agreements must be honoured)'.

[13] The Constitutional Court, in *Mafisa*, further held that as a general rule, a judge should not interfere with the terms of the settlement agreement.⁴ A judge may, however, raise concerns in certain circumstances as contemplated in *Eke*.⁵ The Court gave examples of circumstances in which a settlement agreement may

² *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (*Eke*) paras 25-26.

³ *Mafisa v Road Accident Fund and Another* [2024] ZACC 4; 2024 (6) BCLR 805 (CC) (*Mafisa*) para 36.

⁴ *Ibid* para 50.

⁵ *Op cit* fn 2.

offend public policy. These include, when the amount in the settlement agreement differs significantly with amounts in similar cases so as to give rise to a reasonable suspicion and when an amount in the settlement agreement exceeds the pleaded claim.

[14] The Constitutional Court emphasised that a judge is not entitled to demand the parties to address his or her concerns. Once he or she has informed the parties of the concerns, it is upon the parties to elect whether to address the concerns or indicate to the judge that they regard the matter as settled between them. In this regard, the Constitutional Court stated the following in *Mafisa*:

‘In such a case, the Judge will note on the court file that the matter has been settled between the parties and that the settlement agreement will not be an order of court. If the parties elect to address the issues raised and the Judge is satisfied, the settlement agreement will be made an order of court. If the Judge is not satisfied, she will refuse to do so. However, the fact that the Judge refused to make the settlement agreement an order of court does not mean that the settlement agreement is invalid. Whether the settlement agreement is valid depends on its terms and the law.’⁶

[15] *Mafisa* approved an earlier decision of this Court in *Road Accident Fund v Taylor (Taylor)*,⁷ which concerned two actions against the RAF, which were settled between the parties without proceeding to trial. This Court, there, reiterated the principles outlined in *Eke*. It further found that a compromise puts an end to the *lis* between the parties and has the effect of *res judicata*.⁸ Courts must, therefore, exercise restraint to ensure that there is no undue imposition on the parties’ contractual freedom.

[16] There was no live dispute between the parties in this matter. They had settled their litigious dispute thereby terminating the court’s jurisdiction to pronounce on it. Although the high court was not obliged to make the settlement

⁶ *Mafisa* para 51.

⁷ *Road Accident Fund v Taylor* [2023] ZASCA 64; 2023 (5) SA 147 (SCA).

⁸ *Ibid* paras 37-42 and 51.

agreement an order of court, it had no power to set it aside when its validity was not placed in issue before it. It was entitled to raise its concerns and leave it to the parties to decide whether they wanted to address the issues or not. If parties chose not to address the issues, then the court could note in the court file that the settlement agreement is not made an order of court as stated in *Mafisa*.

[17] The high court's adverse finding of fraud and dishonesty against Mr Ubisi's legal representatives was inappropriate. As in *Taylor*, the legal practitioners were not given notice or afforded an opportunity of a fair hearing before findings of dishonesty and impropriety were made against them. In that regard the findings and referrals to the Legal Practice Council 'are manifestly unjust' and cannot stand.⁹ Furthermore, a court is not entitled to make a finding of fraud without clear evidence. There was no evidence to sustain or justify the court's finding of fraud and dishonesty.¹⁰

[18] This Court, in *Motswai v RAF*,¹¹ was severely critical of the manner in which the judge in the court of first instance (in that matter) had made findings of fraud against an appellant's attorney. The Court stated that:

'Through the authority vested in the courts by section 165(1) of the Constitution, judges wield tremendous power. Their findings often have serious repercussions for the persons affected by them. They may vindicate those who have been wronged but they may condemn others. Their judgments may destroy the livelihoods and reputations of those against whom they are directed. It is therefore a power that must be exercised judicially and within the parameters prescribed by law. In this case, it requires a judge to hold a public hearing so that interested parties are given an opportunity to deal with the issues fully, including allowing them to make all the relevant facts available to the court before the impugned findings were made

⁹ Ibid paras 33-34.

¹⁰ *Prinsloo NO v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 17-19.

¹¹ *Motswai v Road Accident Fund* [2014] ZASCA 104; 2014 (6) SA 360 (SCA); [2014] 4 All SA 286 (SCA) (*Motswai*).

against them. The judge failed to do so, and in the process, did serious harm to several parties'.¹²

[19] Counsel for the appellants correctly submitted that the findings made by the high court and the consequent order had the potential to tarnish the reputation of Smalman Inc and counsel on brief and the order made will set the law in motion to have them both investigated professionally, unduly so.

[20] In light of the above, the order of the high court must be set aside and be replaced with the one making the settlement agreed to by the parties an order of court as there is no evidence of impropriety warranting a remittal. The agreement which was presented to Mbongwe J, is attached to this judgment and marked 'X'.

[21] Regarding costs, counsel for the appellants submitted that the RAF's failure to abandon the judgment granted by the high court, compelled the appellants to proceed with the appeal, incurring costs. He therefore contended that the RAF should pay the costs of the appeal. I do not agree with this submission. Not only was the RAF not responsible for the order made by the high court, the appellants would have had to approach this Court on appeal, given the adverse order made against Mr Ubisi's legal representatives. Moreover, the RAF did not oppose the appeal. It served a notice to abide. There should therefore be no order as to costs for the appeal.

[22] In the result, the following order is made:

- 1 The appeal is upheld.
- 2 The order of the high court is set aside and replaced with the following:

'The draft order marked "X" is made an order of court.
- 3 There is no order as to costs.

¹² Ibid para 59.

D S MOLEFE
JUDGE OF APPEAL

Appearances

For the appellants: N G D Maritz SC with C Van der Merwe
Instructed by: Nel van der Merwe Smalman Inc., Pretoria
Honey Attorneys, Bloemfontein.

“X”

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 64167/2017 –Y

Before the Honourable Justice Mbongwe J.

On this the 6th day of May 2022.

This Order is made an Order of Court by the Judge whose name is reflected hereon, duly stamped by the Registrar of the Court and is submitted electronically to the parties or their legal representative via e-mail. This Order is further uploaded to the electronic file of this matter on CaseLines by the Judge or his Secretary. The date of this Order is deemed to be 6 May 2022.

In the matter between:

M K UBISI

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

RAF LINK NO: 4[...]

RAF REF NO: 5[...]

DRAFT ORDER

By Agreement between the parties, it is hereby ordered that:

1. The Defendant is liable to compensate the Plaintiff for 100% of his proven or agreed damages;
2. **The Defendant is ordered to pay to the Plaintiff the amount of R2 549 830.20 (Two million five hundred and forty nine thousand eight hundred and thirty rand, twenty cents)** in delictual damages which amount is payable by Defendant to Plaintiff within one hundred and eighty days (180) days from date of this order, by depositing same into Plaintiffs' attorneys of record's trust account, the details of which are as follows:

ACCOUNT HOLDER : NEL VAN DER MERWE SMALMAN INC

BANK : FIRST NATIONAL BANK

TYPE OF ACCOUNT : TRUST

ACCOUNT NUMBER : 6[...]

BRANCH : THE GROVE

BRANCH CODE : 2[...]

REFERENCE NUMBER : WN3161 / R STEENKAMP

3. The Defendant will be liable for interest on the capital amount due to the Plaintiff at the prescribed interest rate applicable on the date of the Order as from the date of this order to date of payment should they fail to make payment of the capital amount timeously.
4. The Defendant must furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996, for 100% of the costs of the future accommodation of him in a hospital or nursing home or treating of or rendering of a service to him or supplying goods to him, unlimited to the expenses incurred thereunder, arising out of the injuries sustained by him in the motor vehicle collision on 5 September 2015 after such costs have been incurred and upon proof thereof.
5. The Defendant is ordered to pay the Plaintiffs' taxed or agreed party and party costs on a High Court Scale, within the discretion of the Taxing Master, which costs will include, but will not be limited to, the following:
 - 5.1. The reasonable taxable fees for consultation and preparation for trial, as well as the costs of the reports, addendum reports, joint minutes of all of the Plaintiff's experts, as well as all expert affidavits;
 - 5.2. The costs of Plaintiff's senior- junior counsel, including but not limited to preparation and day fee/ attendance for trial for 17 August 2021 as well as 25 November 2021 respectively, as well as the costs of the Heads of argument/ amended heads of argument as well as the joint memorandum of settlement, as well as the costs of making this settlement an order of Court (if any);
 - 5.3. The costs for the preparation, travelling, and attendance of all the respective pre-trial conferences by the plaintiff's representatives, including any

scheduled Judicial Management meetings or Case Management meetings at Court;

5.4. The costs in respect of the preparation, drafting and copying of all the bundles of documents, expert reports, pleadings and notices and all indexes thereto;

5.5. The costs attendant upon the obtaining of payment of the amounts referred to in this Order;

5.6. The reasonable taxable travelling, subsistence, accommodation and transportation costs, if any, of the Plaintiff to the medico-legal examination(s) arranged by Plaintiff and Defendant;

5.7. The costs for the preparation, inspections, consultations, and attendance of the respective trial/s by the plaintiff's representatives on 17 August 2021 and 25 November 2021 respectively.

6. Payment of the above costs by the Defendant is subject to the following conditions:

6.1. Plaintiff is ordered to serve the notice of taxation of plaintiff's party and party bill of costs on defendant's attorneys of record;

6.2. The Defendant is ordered to pay the Plaintiffs' taxed and/or agreed party and party costs within 14 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties;

6.3. The Defendant will be liable to pay interest at the prescribed interest rate applicable at the time, per annum on the amount referred to above under 6.2 if payment is not effected timeously.

7. Past medical and hospital expenses are separated in terms of Rule 33(4) and postponed sine die.

8. The Plaintiff entered into a contingency fee agreement with his legal representatives.

BY ORDER

REGISTRAR

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obo DEFENDANT: THABISO SEOPELA
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RAF Ref: 5[...]