

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: **2021/38604**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
 _____ SIGNATURE	
<u>06/06/2024</u> DATE	

In the matter between:

NKQETO: JOSCELINA WEZIWE N.O.

Applicant

(In her capacity as the Executrix of the
Late Lulama Princess Mpukwana –Velaji)

and

ROAD ACCIDENT FUND

Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

CORAM: NOWITZ AJ

BACKGROUND

1. This is an Application for Leave to Appeal against an *ex tempore* Judgment delivered by me on **30 January 2024**, wherein I made the Settlement Agreement between parties an Order of Court, with full reasons for same being furnished on the day. Notwithstanding the foregoing, reasons were nonetheless requested out of time on **27 March 2024** and furnished on **8 April 2024**.

2. For the sake of convenience, the parties are referred to hereunder, as they were cited in the Main Application.
3. A Notice of Application for Leave to Appeal was delivered out of time on **14 May 2024**, and inexplicably refers to the Court Order having been issued on **5 March 2024** (when in fact it was issued and signed by me on **30 January 2024**) and Reasons having been furnished on **8 April 2024**.

THE CONDONATION APPLICATION

4. A Condonation Application was delivered on **5 June 2024**, being the day before the hearing of this Application. Mr Mkize representing the Applicant submits that no good cause has been shown in paras 8 to 12 of the Founding Affidavit for condoning the Respondent's non compliance with the provisions of Rule 49(1(b)) (with which I agree), even if one were to accept, that the Respondent was entitled to request Reasons as late as **27 March 2024**.
5. Mr Skosana for the Respondent conceded that there was no explanation for the period **30 January 2024** to **5 March 2024** and that the Order was signed by me on **30 January 2024**. The reference to **5 March 2024**, appears to be a reference to a date stamp on the Order, but since same was not uploaded onto Caselines, Mr Skosana could not take the matter further.
6. As such, the period of the delay has not been fully explained and it is trite that this alone should justify the dismissal of the Application for Leave to Appeal with costs. However, I nonetheless deem it necessary to address the grounds set out in the Notice of Application for Leave to Appeal hereunder. Accordingly, in the exercise of my discretion Condonation is granted.

REQUIREMENTS FOR THE GRANTING OF LEAVE TO APPEAL

7. In order to succeed in obtaining Leave to Appeal, an applicant must satisfy the Court on proper grounds that the Appeal would have a reasonable prospect of success, or that there is some other compelling reason why the Appeal should be heard. (See: **The Mont Chevaux Trust Tina Goosen and 18 Others 20143**

JDR 2325 (LCC) at para 16). In other words, there must be a sound rationale basis for the conclusion that there are prospects of success on Appeal. (See: **S v Smith 2012(1) SACR 567 (SCA) at para 7)**

8. What is required is for me to consider "*objectively and dispassionately, whether there is a reasonable prospect that another court may well find merit in arguments advanced by the losing party*" (See: **Valley of the Kings Thaba Motswere (Pty) Ltd and Ano v Al Mayya International [2016] 137 (ZAECHGHC) 137 (10 November 2016) at para 4).**
9. The Court's discretion is circumscribed, because it may not grant Leave to Appeal based on a reason other than those mentioned in ss17(1)(a)i) or(ii). (See: **School Governing Body, Grey College Bloemfontein v Scheepers and Others)(South African Teachers Union Intervening) [2019] ZAFSHC 25 (17 January 2019) at para 4).**
10. Further, the Court should give careful and proper consideration to the reason advanced, before categorizing it as compelling. Thus Section 17(1)(a)(ii) should not be invoked for flimsy reasons. (See: **School Governing Body supra at para 6).**

GROUND OF APPEAL

11. In the present matter, the Applicant, being the Executrix of the Deceased's Estate, (the Deceased having been the Claimant), applied to have the Settlement Agreement concluded on **6 May 2022** declared binding and made an Order of Court. She also sought costs on the Attorney and Client Scale. (**Caselines 01-8**)
12. The conclusion of the Settlement Agreement was common cause (**Caselines 21-10, para 3.1**)
13. What was in dispute was the Deceased's entitlement to future loss of earnings (FLE). since these are damages that will no longer be incurred, according to the Respondent, due to her passing (**Caselines 21-10, para 3.1**).

14. As I found in my *ex tempore* Judgment delivered on **30 January 2024** and reiterated in the Reasons provided on **8 April 2024**:

14.1. parties are bound by the agreements they make, even if the contractual obligations agreed upon are to one's detriment. See **Theodosiou and Others v Schindlers Attorneys and Others [2022] 2 All SA 256 (GJ)**.

14.2. as a consequence upon the Applicant accepting the Respondent's offer, transactio took place. The original claim was extinguished and a valid and binding Settlement Agreement came into existence. See: **Road Accident Fund v Ngubane [2007] SCA 114 para 12; Gollach and Gomperts (1978) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A) at 921**.

14.3. the Respondent accepted an element of risk, that its bargain might not be as advantageous to it, as litigation might have been. This is the inherent risk of compromise. However, it doesn't entitle the Respondent to go back on its bargain, because it didn't factor the Deceased's early passing into the Settlement Agreement. See further **Slabbert v MEC for Health and Social Development of Gauteng Provincial Government (432/2016) [2016] ZSACA 157 (3 October 2016), para 16**.

15. The grounds set out in the Respondent's Application for Leave to Appeal seeks to contend that these basic common law principles should be jettisoned, because to enforce the contract would be to deprive other more deserving parties of compensation and to disregard the purpose for which the Fund was established, as well as its scarce resources.

16. The grounds set out in **1.1** and **1.2** of the Notice constitute a misrepresentation of the facts. The Deceased was a person contemplated in **1.1** and did suffer damages in respect of future loss of earnings, prior to the institution of action. This is why provision was made for same in the Respondent's Offer which was accepted and which resulted in the conclusion of the Settlement Agreement.

The fact that the Deceased died before the Settlement Agreement could be made an Order of Court, does not detract therefrom.

17. If the Deceased had died a month after the Settlement Agreement was made an Order of Court and the Respondent had paid out, this would not have entitled the Respondent to a refund, because the Settlement Agreement made no provision for same. Mr Skosana for the Respondent conceded that had the Deceased passed away a month after the Settlement Agreement was made an Order of Court, there would have been no issue of the Respondent honouring the Settlement Agreement.
18. The grounds advanced in 1.3 and 1.4 of the Notice are, in my view, totally irrelevant to the original claim and to the Settlement Agreement which the parties concluded.
19. With regard to 1.5 of the Notice, in my view, the Deceased's rights in terms of the Settlement Agreement, do in fact accrue to her Estate and the settlement Agreement served to novate the Deceased's original claim. Mr Skosana conceded in argument that at common law, the Deceased's rights accrue to her Estate.
20. With regard to 1.6 of the Notice, provision for loss of future earnings is a basic feature of the Scheme and the objects of the RAF Act and as such cannot be construed as being contrary to public policy.
21. With regard to 2 of the Notice, the party who seeks to avoid enforcement of the contract bears the onus to prove that the contract is offensive to public policy. See: **Beadica 231 CC and Others v Trustees Oregon Trust and Others 2020 (5) SA 247 CC**. I found that the Respondent had failed to discharge this onus and I do not believe that another Court will come to a different conclusion. The Settlement Agreement was not conditional upon the Deceased not dying within a prescribed period of time from the date of the Settlement, nor of any monies having to be refunded, if the Deceased died within a shorter period than that used to calculate the loss of future earnings

22. With regard to **3** and **4** of the Notice, this case is fact specific and the reference to an alleged inability to pay "*legitimate*" claimants, because of financial constraints is offensive, since it suggests, that the Deceased's claim and the Settlement Agreement were not legitimate, neither of which is the case. Nothing precluded the Respondent from inserting whatever terms and conditions it wished in its settlement offer and it was up to the Deceased, whether to accept or to reject same. The Respondent's offer in the present instance, contained no provisions relating to the Deceased dying prematurely. Accordingly, I do not believe that another Court will come to a different conclusion.
23. In para 7.2 of Mr Skosana's Heads of Argument, he referenced Sections 17(4)(b) and (c) of the Act, and stated that same "*provide for the payment of FLE by way of either a lumpsum or instalments*". He could not point me to any provision in the Act, which contained a prohibition of the Respondent inserting a caveat, that in circumstances where it elected to pay in instalments, such instalments would cease in the event of the Applicant dying before the last instalment was made. In the present case, the Respondent had elected to offer a lumpsum amount for FLE which the Applicant accepted.
24. With regard to **5** of the Notice, the Deceased had suffered a loss of future earnings. These had to be calculated from the time that such loss occurred and this was done. The Respondent had accepted same and made an unconditional offer in respect thereof, which formed part of the Settlement Agreement. As such, there is no merit to the suggestion that the enforcement of a Settlement Agreement which is valid and binding would axiomatically deprive other claimants who are still alive of funds for sustenance, or infringe upon the rights of "lawful" claimants.
25. The Respondent in Heads of Argument uploaded on **5 June 2024**, placed much reliance on **Mafisa v RAF 2024 (6) BCLR 805 (CC)**. Mr Skosana conceded however, that there was nothing in the Settlement Agreement itself, that was objectionable, that it accorded with the Constitution, was not offensive to public

policy and that the requirements set out in para 40 of such Judgment had been satisfied, in relation to the Settlement Agreement itself.

26. In para 9 of Mr Skosana's Heads of Argument, he contended that the FLE portion fell outside the scope of the Deceased Plaintiff's case at the time of the Court Order in question. I respectfully disagree with this contention.

27. With regard to 6, 7 and 8 of the Notice, having given careful and proper consideration to the reasons advanced, I am not satisfied that the Appeal would have a reasonable prospect of success, or that there is some other compelling reason why the Appeal should be heard.

COSTS

28. Mr Mkize sought a punitive costs order, both in respect of the Application for Condonation and the Application for Leave to Appeal.

29. In the exercise of my discretion, I find that costs should be payable on the party and party scale, Table C (Rule 67A read with Rule 69).

ORDER

30. The Application for Condonation is granted, with the Respondent (RAF) to pay the costs thereof on the party and party scale, Table C (Rule 67A read with Rule 69).

31. The Application for Leave to Appeal is dismissed with costs with the Respondent (RAF) to pay the costs thereof on the party and party scale, Table C (Rule 67A read with Rule 69).



M NOWITZ

ACTING JUDGE OF THE HIGH COURT

6 JUNE 2024