CASES / VONNISSE

The Power of Judges to Vary the Terms of a Settlement Agreement Unilaterally: The Way Forward

Mafisa v Road Accident Fund [2024] ZACC 4

1 Introduction

The Constitutional Court in *Mafisa v Road Accident Fund* ([2024] ZACC 4) is an important judgment for legal practitioners, academics and litigants as the court addressed a significant legal issue regarding the authority of judges to amend settlement agreements unilaterally.

Section 34 of the Constitution of the Republic of South Africa, 1996 (Constitution) expressly makes provision for everyone to have "any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". Van der Westhuizen J in *Road Accident Fund v Mdeyide* ([2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC)) reinforced this notion by stating that the fundamental right of access to courts is essential for constitutional democracy under the rule of law. The court indicated that, to enforce one's rights under the Constitution, legislation and the common law, everyone must be able to have a dispute that can be resolved by the application of law decided by a court. The right of access to courts is thus protected in the Constitution (*Road Accident Fund v Mdeyide supra* par 1). In the course of having a dispute resolved, many litigants settle their disputes before they proceed to trial. In fact, on 9 March 2020, the legislature introduced Rule 41 (A) of the Uniform Rules of the High Court (Rules Regulating the Conduct of the Proceedings of the Provincial and Local Divisions of the High Court of South Africa GN R48 in *GG* 999 of 1965-01-12, as amended), to encourage litigants to settle their disputes rather than engage in protracted and costly litigation. There are similar rules in the magistrates' courts, which attempt to assist parties in resolving their disputes in an expeditious manner (see the Rules Regulating the Conduct of Proceedings of Magistrates' Courts GN R740 in *GG* 33487 of 2010-08-23, as amended under Rules 70–79).

Entering into settlement agreements or compromises has been an entrenched practice in our litigation landscape and has been recognised by our courts (see *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) 95). In *Ex Parte Le Grange; Le Grange v Le Grange* ([2013] ZAECGHC 75; [2013]

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4 All SA 41 (ECG); 2013 (6) SA 28 (ECG) par 34), the court held that "a compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits". According to Rycroft, the voluntary settlement of disputes is preferred as opposed to resorting to adjudication (Rycroft "Settlement and the Law" 2013 130 *The South African Law Journal* 187). By entering into bilateral consensual settlement agreements, litigants retain control over the outcome of the matter even though this comes in the form of a compromise. Rycroft sets out a number of motivating factors that may encourage parties to enter into a settlement agreement. They range from curtailing legal costs to avoiding protracted litigation, litigation fatigue, public opinion on the matter, the need to keep the matter away from public scrutiny, protection of a party's image, and the choice of the presiding officer (Rycroft 2013 *The South African Law Journal* 187–190). It is also submitted that a litigant may enter into a settlement agreement that has less favourable terms than a court order may achieve in order to ease the financial distress that they may be experiencing as a result of the incident that gave rise to the cause of action.

Entering into a settlement agreement not only has benefits for the parties but also has a direct and positive impact on the administration of justice. The burden placed on the court rolls is eased, and in turn, the courts can hear other matters that are ready to proceed to trial (*Ex Parte Le Grange; Le Grange v Le Grange supra* par 23). In turn, this facilitates access to justice for litigants who wish to make use of our system of civil courts.

However, not all parties to a settlement agreement will abide by the terms of an agreement. Therefore, parties in some instances request that certain terms be incorporated into an order of the court. It must be noted that certain divisions of the High Court of South Africa do not incorporate all the provisions of a settlement agreement into a court order (Peté, Hulme, Du Plessis, Palmer, Sibanda and Palmer *Peté and Hulme's Civil Procedure: A Practical Guide* 4ed (2023) 484–485). The KwaZulu-Natal High Court is one such division. The decision in *Mansell v Mansell* (1953 (3) SA 716 (N)) set the platform for this practice. The then Judge President Broome stated:

> "For many years this Court has set its face against the making of agreements orders of Court merely on consent We have frequently pointed out that the Court is not a registry of obligations. Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of Court, the obligee's remedy is to execute merely. The only merit in making such an agreement an order of Court is to cut out the necessity for instituting action and to enable the obligee to proceed direct to execution. When, therefore, the Court is asked to make an agreement an order of Court it must, in my opinion, look at the agreement and ask itself the question: 'Is this the sort of agreement upon which the obligee (normally the plaintiff) can proceed direct to execution?' If it is, it may well be proper for the Court to make it an order. If it is not, the Court would be stultifying itself in doing so. It is surely an elementary principle that every Court should refrain from making orders which cannot be enforced. If the plaintiff asks the Court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer." (*Mansell v Mansell supra* 721)

The key difference between a settlement agreement that has not been made an order of court and one where certain provisions have been incorporated into a court order lies in the enforcement of the settlement agreement in the

event of a breach. In the former scenario, the aggrieved party must approach the court to hold the party that is not performing in terms of the settlement agreement accountable. The non-performing party will then be given an opportunity to comply, and only in the event of failure to comply can the agreement be acted upon by the aggrieved party.

On the other hand, in the latter scenario, the order becomes immediately enforceable upon breach, and the aggrieved party may proceed to execution (*Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) 12). More importantly, there is a change in the status of the rights and obligations of the parties that gave rise to the cause of action. First, it brings an end to the cause of action that gave rise to the dispute between the parties, and secondly, the dispute between the parties becomes *res judicata* (Peté and Hulme *et al Civil Procedure: A Practical Guide* 485). *Res judicata* refers to instances where a court adjudicates on a matter and gives a final judgment (Peté and Hulme *et al Civil Procedure: A Practical Guide* 257). In other words, the parties cannot litigate on the same cause of action in the future.

This case note aims to discuss the value of settlement agreements generally in litigation matters. The note also provides guidance on the role that judges play when settlement agreements are reached and proposed by litigants in light of the judgment in *Mafisa v Road Accident Fund* (*supra*).

2 Facts of *Mafisa v RAF*

On 31 January 2016, Tumelo Mafisa (the applicant) was a passenger in a motor vehicle that was involved in a collision when the driver of the vehicle collided with a tree (par 6). As a result of the collision, the applicant suffered bodily injuries that included a fracture of the left proximal humerus, abrasions of the lower back and lacerations of the scalp. According to the applicant, the accident was caused by the sole negligence of the driver. The applicant suffered damages in the form of medical expenses, loss of earnings and general damages, and he subsequently instituted an action against the Road Accident Fund (RAF) (the respondent) for compensation (par 6). The cumulative claim for compensation was in the amount of R2 387 568,00 (par 7). A claim of R1 537 568,00 was specifically for past and future loss of earnings. The respondent defended the action and filed its plea disputing liability and hence the amount claimed (par 7).

3 Prior proceedings

The applicant issued a summons in the High Court against the RAF and claimed an amount of R2 387 568,00 for past and future medical expenses, past and future loss of earnings and general damages. His pleaded claim in respect of past and future loss of earnings was R1 537 568,00. The RAF filed its plea and, save to state that the applicant had provided his hospital records, it disputed liability and the quantum of the claim (par 7).

The matter was duly enrolled and set down for trial on 11 and 12 May 2021 in the Bloemfontein High Court before Daniso J (par 8). On the first day of the hearing, the parties requested that the matter be stood down for

settlement negotiations. The next day, the judge was advised that the parties had concluded a settlement agreement. There was no hearing, and no evidence was adduced (par 8). The matter did not proceed to trial, and the parties entered into a settlement agreement, which they requested Daniso J to make an order of court (par 8). The key terms of the agreement were:

> "1.1 The Defendant is liable to pay 100% ... of the proven or agreed damages;
> 1.2 The Defendant shall pay the Plaintiff the sum of R1 652 715.70 ...
> The amount is made up as follows:
> Loss of earnings: R1 302 715.70
> General damages: R350 000.00
> Total: R1 652 715.70
> 1.3 The Defendant shall pay the amount of R1 652 715.70 ... into the Plaintiff's attorney's trust account." (par 9)

In terms of the agreement, the RAF would also provide an undertaking in terms of section 17(4)(*a*) of the Road Accident Fund Act (56 of 1996) (the Act) in respect of medical costs and pay the applicant's costs (par 10).

The judge was in possession of the court file, which contained the pleadings, the applicant's expert reports from an industrial psychologist, occupational therapist, orthopaedic surgeon and an actuarial report. The parties approached the judge in chambers and requested her to make a draft consent order incorporating the terms of their settlement agreement, an order of court.

The judge, without elaborating, indicated that she was not entirely satisfied with the terms of the draft order. She reserved judgment to consider the proposed settlement (par 11).

On 15 June 2021, the High Court handed down a written judgment in which it held that the applicant had failed to prove that he sustained damages with respect to past and future loss of earnings (par 12). The High Court found the industrial psychologist's report unpersuasive and held that it failed to prove that the applicant sustained damages with respect to past and future loss of earnings (par 13). As a result, the court refused to award the applicant the agreed quantum of damages in respect of loss of earnings – that is, R1 302 715,70 – on the basis that the tender by the RAF was not justified (par 13). The High Court unilaterally amended the draft order by striking out the amount for loss of earnings and awarded the applicant the agreed amount of R350 000,00 for general damages only.

The applicant applied for leave to appeal to the full bench of the High Court and then petitioned the Supreme Court of Appeal. These applications were dismissed, as was the application to the President of the Supreme Court of Appeal for reconsideration in terms of section 17(2)(*f*) of the Superior Courts Act (10 of 2013) (par 14–15).

4 Arguments in the Constitutional Court

4 1 Applicant's submissions

In the Constitutional Court, the applicant submitted that the matter raised two constitutional issues. First, the applicant argued that the unilateral alteration of a settlement agreement without affording parties an opportunity to be heard amounts to a procedural and substantive irregularity (par 16). In this regard, the applicant argued that his right to a fair hearing was infringed, and the basic notions of fairness and justice were undermined. The applicant further argued that despite presenting evidence of the impact of his injuries on his earning capacity, he now faced an impoverished future without the just, reasonable and fair compensation to which he was entitled. This, he submitted, amounted to an infringement of his right to equality and human dignity (par 16). The second constitutional issue raised by the applicant was that the High Court discarded its role as impartial arbiter when it stepped into the role of the Executive as the guardian of public funds, thereby infringing the separation-of-powers doctrine. The applicant highlighted the purpose of a settlement agreement – that is, to bring an end to existing litigation or to prevent or avoid future litigation (par 16). The applicant emphasised that the settlement agreement concluded by the parties created a substantive contract with new rights and obligations that exist independently of the original cause. As such, the original cause is *res judicata* and the court should not have interfered with the agreement (par 17).

The applicant recognised the discretion of courts to make a settlement agreement an order of court, and that a court, in exercising this discretion, must consider all relevant factors set out in *Eke v Parsons* (*supra* par 6). According to the applicant, the High Court should have demanded that the parties engage it on aspects with which the court took issue, instead of amending the settlement agreement by striking out the agreed amount for loss of earnings (par 18).

The applicant submitted that this matter raises an arguable point of law of general public importance – namely, whether a judge can, of their own accord, alter a settlement agreement without affording the parties an opportunity to be heard, thereby binding parties to an agreement that they did not intend to make. This was especially important as settlement agreements are the norm in RAF litigation and affect a number of other litigants who approach the courts to have settlement agreements made orders of court (par 19).

4 2 Submissions by the amicus curiae

The Personal Injury Plaintiff Lawyers Association (PIPLA) was admitted as *amicus curiae* in these proceedings (see also Covey "*Amicus Curiae*: Friend of the Court" 1959–1960 9 *DePaul LR* 30; Murray "Litigating in the Public Interest: Intervention and the *Amicus Curiae*" 1994 *SAJHR* 242; Mubangizi and Mbazira "Constructing the *Amicus Curiae* Procedure in Human Rights Litigation: What Can Uganda Learn From South Africa?" 2012 *Law and Democracy Development* 204; Thabane "Stacking the Odds Against the

Accused: Appraising the Curial Attitude Towards *Amici* Participation in Criminal Matters" 2011 24(1) *SACJ* 23–24; *Children's Institute v Presiding Officer of the Children's Court District of Krugersdorp* 2013 (2) SA 620 (CC) – these sources explain the role and value of the *amicus curiae*). The submissions made by PIPLA were similar to those made by the applicant (par 20). PIPLA reiterated that jurisdiction is determined by the dispute between the parties, and that a compromise, whether or not embodied in a court order, terminates the litigation between the parties and thus has the effect of *res judicata*. PIPLA argued that the parties did not approach the High Court to pronounce on the validity and enforceability of the settlement agreement and, therefore, the High Court did not have the power to do so (par 20).

PIPLA submitted that the applicant exercised his contractual freedom to conclude a compromise on terms agreeable to him and not on terms that may eventually be agreeable to a court. In turn, the RAF voluntarily made an offer of settlement, which the applicant accepted. According to PIPLA, the unilateral variation of the draft order infringed the applicant's right to contract freely and also offends and disregards the parties' right to settle their dispute voluntarily on mutually agreeable terms (par 22). Like the applicant, PIPLA argued that the High Court's unilateral alteration of the settlement agreement had infringed the separation-of-powers doctrine. PIPLA highlighted that the RAF is a creature of statute, authorised to settle disputes with claimants (par 23). The Act, moreover, does not empower courts to oversee the finances and management of the RAF. As a result, and in the absence of a pleaded challenge to a settlement agreement, PIPLA submitted that the High Court's unilateral alteration amounts to an impermissible intrusion by the court into the sphere of the Executive. By acting as the custodian of the RAF, the High Court infringed the applicant's right to equal treatment before the law (par 23).

4 3 Submissions of court-appointed counsel

The General Council of the Bar of South Africa was approached by the Constitutional Court to appoint counsel to make submissions on the issue of the High Court's power to investigate the merits of a settlement (par 26). According to the counsel appointed to assist the court, the High Court's point of departure was that the parties requested it to determine a dispute. The parties, however, had requested that the draft order, which represented the settlement of the matter between them, be made an order of court (par 26). The court-appointed counsel submitted that he could not advance submissions in support of the High Court's power to investigate the merits of a settlement, as such a power would amount to adjudicating a dispute where none exists as a result of a compromise. For such a power to exist, the common law would have to be developed to vest such a power in the High Court (par 26).

The court-appointed counsel argued further that a court's power to make a settlement agreement an order of court requires a determination of whether it would be appropriate to incorporate the terms of the compromise into an order of court (par 27). The court-appointed counsel submitted further that if a court finds that the requirements of *Eke v Parsons* (*supra* par

6) are not satisfied, it will not make the settlement agreement an order of court. However, the court would not be entitled to amend or modify a settlement agreement of its own accord (par 27).

5 Judgment

Mhlantla J (with Zondo CJ, Kollapen J, Mathopo J, Rogers J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ concurring) held that the Constitutional Court did have jurisdiction to hear the matter as the application concerned the right to a fair public hearing insofar as the High Court failed to apprise the parties of its concerns and proceeded to amend the settlement agreement unilaterally par 39).

On the merits of the application, the court focused on two issues: first, whether a court is empowered to amend a settlement agreement concluded by the parties; and secondly, what procedures a court should follow if it is of the view that it should not make a settlement agreement an order of court (par 33).

Regarding the first issue, Mhlantla J held that a court is not generally empowered to unilaterally amend a settlement agreement. A compromise, whether or not embodied in a court order, generally brings an end to the dispute between the parties (par 33). According to Mhlantla J, when a compromise is reached, new contractual rights and obligations arise and these exist independently of the original cause of action; the parties are then precluded from proceeding on the original cause of action. Nevertheless, although a compromise has the effect of *res judicata*, this does not mean that a court has no power to raise concerns over the terms of settlement agreements (par 33).

The court explained that its judgment is not authority for the position that a court has no jurisdiction to raise concerns over settlement agreements. When a court is required to make a settlement agreement, the concerns raised in *Eke v Parsons* (*supra*) demand that courts ensure that the agreement is competent and proper before it can be given the seal of a court order (par 48–49). According to Mhlantla JA, a settlement agreement will only be competent and proper if it a) relates directly or indirectly to the dispute between the parties; b) "accord[s] with both the Constitution and the law [and is] not … at odds with public policy"; and c) holds some practical and legitimate advantage (par 48–49).

As regards the second issue, Mhlantla J stated that in terms of the principle of *pacta sunt servanda*, judges should typically refrain from interfering with the terms of a settlement agreement that parties have entered into freely and voluntarily (par 50). Exceptions may arise when a settlement agreement may offend public policy, such as when there is a significant difference between the amount in the agreement and the amount that could reasonably be expected to be agreed upon between parties in similar cases, thereby giving rise to a reasonable suspicion of an inflated amount or possible corruption (par 50).

Mhlantla J further held that the High Court did not have the power to amend the settlement agreement unilaterally; therefore, it had exceeded its

jurisdiction (par 54). Furthermore, according to Mhlantla J, the High Court's failure to raise its concerns with the parties and the failure to allow them an opportunity to address these concerns is contrary to the *audi alteram partem* principle, which places an obligation on the court to hear the parties before making an order that is adverse to them (par 51–53).

Mhlantla J further stated that the High Court did not inform the parties about its concerns in respect of the proposed quantum of damages, nor did it provide them with an opportunity to address these concerns (par 53). In addition, the High Court considered information obtained from actuarial and industrial psychologists' reports that were never placed as evidence before it and found that it failed to prove that the applicant sustained damages with respect to past and future loss of earnings. As a result, the Constitutional Court held that the High Court was incorrect in concluding that the applicant was not entitled to an award for loss of earnings (par 53).

Accordingly, the Constitutional Court upheld the appeal and set aside the order of the High Court. As there was no evidence of impropriety in relation to the settlement agreement, there was no basis for a remittal. The Constitutional Court replaced the order of the High Court with the original settlement agreement agreed to by the parties and made it an order of court (par 55). As to costs, the court held that the RAF was not responsible for the High Court's impermissible alteration to the draft order. The RAF also did not oppose the application for leave to appeal. As such, Mhlantla J made no order as to costs beyond those already provided for in the draft order (par 55).

6 Discussion

6 1 Jurisdiction and leave to appeal

It was common cause between the parties that the High Court failed to inform the parties of its concerns and then proceeded to amend the settlement agreement unilaterally (par 30). The failure by the High Court to actively engage with the parties on its concerns implicates the right to a fair public hearing, which is guaranteed in section 34 of the Constitution. The Constitutional Court in *Mmabasotho Christinah Olesitse NO v Minister of Police* ([2023] ZACC 35; 2024 (2) BCLR 238 (CC) par 36) held that preventing a party from having their claim resolved by the application of law before a court implicates section 34 of the Constitution and "[t]hat, without doubt, engages this court's jurisdiction" (see also *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) par 18). As a result, the Constitutional Court in the present matter did have jurisdiction to hear the matter (*Mafisa v RAF supra* par 30).

In *S v Boesak* ([2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) par 11–12), the Constitutional Court stated that just because the court may have jurisdiction to hear the matter does not automatically lead to the conclusion that the court will grant leave to appeal. The Constitutional Court is still required to satisfy itself that it is in the interests of justice to grant leave to appeal. The court must, in this regard, consider the prospects of success, the importance of the issues and whether the determination of the

matter will have an impact only on the parties before the court or beyond them (*S v Boesak supra*; *Mafisa v RAF supra* par 31). The present matter raised important constitutional issues. Furthermore, given the significant number of cases and the manner in which some of the divisions of the High Court have dealt with settlement agreements, leave to appeal was granted (*Mafisa v RAF supra* par 31).

6 2 Principles relating to the nature and extent of settlements and compromise

It is accepted that settlement agreements or compromises have been a part of our law and have been recognised by our courts (see *Van Schalkwyk v Van Schalkwyk supra*), although the guidelines on whether to make a settlement agreement an order of court have always been an exercise of a court's discretion (see *Ex Parte Le Grange; Le Grange v Le Grange supra* par 6; *PL v YL* 2012 (6) SA 29 (ECP), and the order appears at par 40H).

A compromise or settlement is an agreement between the parties to prevent or terminate a dispute by adjusting their differences by mutual consent. It is widely accepted in law that a compromise gives rise to new contractual rights and obligations that exist independently of the original cause of action. In instances where the parties have reached a compromise, the parties are precluded from proceeding on the original cause of action (unless the compromise provides otherwise) (see *Road Accident Fund v Ngubane* [2007] ZASCA 114; 2008 (1) SA 432 (SCA) par 12; *Mafisa v RAF supra* par 33).

Reaching a compromise or settlement is in itself not without the risk, which is voluntarily assumed by both parties, that their bargain may be more or less advantageous than litigating the original cause of action. Compromises and settlement agreements that are in keeping with legally recognised principles find support in our law as they not only serve the interests of the litigants but may also serve the interests of the administration of justice (*Eke v Parsons supra* 22 referring to *Ex Parte Le Grange In re: Le Grange v Le Grange supra* par 34, 36 and 38; in the South African Law Reports, *Ex Parte Le Grange In Re: Le Grange v Le Grange supra* is reported *sub nom PL v YL supra; Mafisa v RAF supra* par 34). A compromise or settlement agreement is placed on an equal footing with a judgment. It puts an end to a lawsuit and renders the dispute between the parties *res judicata*. It encourages parties to resolve their disputes rather than to litigate (*Ex Parte Le Grange In Re: Le Grange v Le Grange supra* 34). According to Huber, "a compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits" (Huber *The Jurisprudence of My Time* 5ed vol 1 (1939) 481, par 3.15.15; see also Voet 2.15.22 and *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (Ck) 284 C–E). Hutchison states that a "compromise [is] the settlement of a disputed claim by agreement between the parties" (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* (2010) 447). The appeal court in *Schierhout v Minister of Justice* (1925 AD 417) supported this view. The court stated that the "law, in fact, rather favours a compromise (*transactio*), or other

agreement of this kind; for *interest reipublicae ut sit finis* litiu [it is in the public interest that there be an end to litigation]" (Schierhout *v Minister of Justice supra* 423; par 35). The court in *Claassens v Claassens* (1981 (1) SA 360 (N)) captures the essence of a settlement:

> "Agreements governing maintenance often cover other topics too. They are frequently compromises over hotly contested issues of all sorts, and the product of hard and protracted bargaining. Everyone with experience of negotiations in matrimonial cases is well aware of that. Questions of 'guilt' and 'innocence', fundamental to the wife's claim for alimony while the 1953 Act lasted and not entirely irrelevant to it since then, may have been disputed. So may the amount she needed, and how much of that the husband could afford. Property had perhaps to be settled or divided, maintenance for children to be resolved. The alimony eventually agreed can seldom be isolated from such surroundings. Like the rest of the compromise, it is the result of give and take. Sometimes it is more than the Court is likely to have awarded the wife had there been none and, in return for a concession elsewhere, she has won by contract what she could not have expected from the litigation. On other occasions it is less, but some contractual benefit the Court would never have decreed has compensated her for the difference." (*Claassens v Claassens supra* 371A–C)

Although the above was said in the context of maintenance in matrimonial disputes, it applies with equal force to other types of suits (*Eke v Parsons supra* par 21).

This does not by implication mean that anything agreed to by the parties should be accepted by a court and made an order of court. A court can only make an order or confirm a compromise or settlement that is competent and proper (*Ex Parte Le Grange; Le Grange v Le Grange supra* par 15). A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place, "relate directly or indirectly to an issue or *lis* between the parties" *Ex Parte Le Grange; Le Grange v Le Grange supra* par 15).

The compromise or settlement agreement reached by the parties must not be objectionable – that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order (*Ex Parte Le Grange; Le Grange v Le Grange supra* par 15). In other words, the compromise or agreement must be in accordance with both the Constitution and the law. The compromise or agreement must also be in keeping with public policy (on what we measure public policy against, see *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) par 28–9; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) par 56; *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) par 110; and *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) par 91) and must "hold some practical and legitimate advantage" for the parties to the dispute (*Ex Parte Le Grange; Le Grange v Le Grange supra* par 15; *Hodd v Hodd*; *D' Aubrey v D' Aubrey* 1942 NPD 198 204 to 205; see also Christie *The Law of Contract in South Africa* 8ed (2022) 551–1) (an attempt to oust the jurisdiction of the courts); *Swadif (Pty) Ltd v Dyke NO* 1978(1) SA 928 (A) 945A–B (the order cannot seek to bind or place obligations on third persons who are not parties to the settlement agreement); *Benefeld v West*

2011 (2) SA 379 (GSJ); *Shields v Shields* 1946 CPD 242*; Kotze v Kotze* 2003(3) SA 628 (T)).

In South Africa, public policy is deeply rooted in the Constitution and its underlying values (*Barkhuizen v Napier supra* par 28). Where a contractual term conflicts with a constitutional value, it will be contrary to public policy and unenforceable (*Barkhuizen v Napier supra* par 29–30).

It is accepted in our law that once a settlement agreement has been made an order of the court, it is an order like any other. It will be interpreted like all court orders (*Eke v Parsons supra* par 29*;* see also *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) par 13; *Firestone South Africa (Pty) Ltd v Enticer AG* 1977 (4) SA 298 (A)).

6 3 Pacta sunt sevanda

One of the cornerstones of the law of contract in South African law is the freedom and sanctity of contract (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* (2012) 21). Taking into consideration the requirements of a valid contract, freedom of contract explains that parties are free to enter into contracts and decide on the terms of the contract. The following passage has been approved by South African courts:

> "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty if contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice" (*Wells v South African Alumenite Company* 1927 AD 73).

In *Barkhuizen v Napier* (*supra* par 12), the Constitutional Court stated that "freedom of contract has been said to lie at the heart of constitutionally prized values of dignity and autonomy". The fact that contracts freely and fairly entered into will be enforced promotes legal certainty and commercial certainty, which is an essential requirement for a flourishing, free-market economy (Hutchison and Pretorius *The Law of Contract in South Africa* 22).

Agreements that have been freely and voluntarily entered into between parties must be honoured and enforced by our courts (*Barkhuizen v Napier supra* par 13*;* Hutchison and Pretorius *The Law of Contract in South Africa* 21). This principle is also known as *pacta sunt servanda.* In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (2012 (1) SA 256 (CC) 70), the Constitutional Court described *pacta sunt servanda* as "the age-old contractual doctrine that agreements solemnly made should be honoured and enforced" (see also *Barkhuizen v Napier supra* par 15).

In *Barkhuizen v Napier* (*supra*), the court stated that *pacta sunt servanda* is a universally recognised legal principle (*Barkhuizen v Napier supra* par 87). Furthermore, the principle is considered to be profoundly moral, and the coherence of any society relies on it (*Barkhuizen v Napier supra* par 87; see also Van Der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* 4ed (2012) 140).

In *Barkhuizen v Napier* (*supra*)*,* the Constitutional Court considered the constitutionality of a time-limitation clause in a short-term insurance policy

which prevented an insured claimant from instituting legal action if summons was not served on the insurance company within the time limit set out in the clause (*Barkhuizen v Napier supra*). Ngcobo J recognised the importance of giving effect to parties' freedom to contract in a manner that does not override the right of access to courts (*Barkhuizen v Napier supra* par 55). In this regard, he stated:

> "Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity". (*Barkhuizen v Napier supra* par 57)

In *Beadica 231 CC v Trustees for the time being of Oregon Trust* ([2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) par 81), Theron J stated that the enforcement of contractual terms does not depend on a person's sense of what fairness, reasonableness and justice require. To hold that it does so would be to make the enforcement of contractual terms dependent on the "idiosyncratic inferences of a few judicial minds". This, according to Theron J, would introduce an unacceptable degree of uncertainty into our law of contract, which would be "inimical to the rule of law".

In light of the cases mentioned above, the courts should not readily second-guess parties or alter the parties' decision to settle the issues as they defined them in their pleadings (par 38).

The issue before the Constitutional Court in *Eke v Parsons* (*supra*) concerned the status of settlement agreements that had been made orders of court, and what terms may or may not be contained in those agreements (*Eke v Parsons supra* par 1–3). The applicant had defaulted on his payments under a sale agreement to purchase the membership interest of the respondent in a close corporation. After the respondent applied for summary judgment, the parties concluded a settlement agreement, which was made an order of court (*Eke v Parsons* (*supra*) par 39). The Constitutional Court had to determine whether a settlement agreement, which had been made an order of court, was final in its terms and whether the other party was entitled to approach a court for the enforcement of the order. Madlanga J stated that caution must be exercised so as to ensure that the courts do not accept anything agreed to by the parties when considering whether to make an agreement an order of court (*Eke v Parsons supra* par 25–26). Madlanga J stated further that when parties approach a court to make a compromise an order of court, it must be competent and proper, in that the agreement must: a) relate directly or indirectly to the dispute between the parties; b) not be objectionable in that it must accord with the Constitution and the law and not be offensive to public policy; and c) hold some practical and legitimate advantage (*Eke v Parsons supra* par 25–26; *Mafisa v RAF supra* par 40).

The court in *Motswai v Road Accident Fund* ([2014] ZASCA 104; 2014 (6) SA 360 (SCA)) refused to make a settlement agreement between the applicant and the RAF an order of court. The court expressed the view that the "litigation had been initiated for the sole purpose of benefitting the attorneys and expert witnesses and was an abuse of the system of road

accident compensation" (*Motswai v Road Accident Fund supra* par 15). Cachalia JA in the SCA indicated that apart from the irregularity and unfairness of the proceedings before the first judgment, the judge's reasoning was wrong. According to Cachalia JA, the High Court drew inferences from the documents before her without calling for any further evidence (*Motswai v Road Accident Fund supra* par 45–6; *Mafisa v RAF supra* par 41). The documents before the judge raised questions regarding the efficacy of the claim and the costs incurred in the litigation to date. The SCA concluded that the judge was entitled – indeed obliged – to investigate these questions and, if necessary, to call for evidence, but the judge was not entitled to draw conclusions that appeared obvious to her only from the available documents (*Motswai v Road Accident Fund supra* par 45–6; *Mafisa v RAF supra* par 41).

In *Road Accident Fund v Taylor* ([2023] ZASCA 64; 2023 (5) SA 147 (SCA)), the SCA had to consider the consequences of a settlement agreement on a dispute and the powers of a court in relation thereto. In this case, two actions against the RAF were settled without proceeding to trial (*Road Accident Fund v Taylor supra* 1). The High Court, in respect of both actions, had raised concerns over the settlements reached. Van der Merwe JA in the SCA discussed the principles outlined in *Eke v Parsons* (*supra*) and confirmed that a compromise extinguishes disputed rights and obligations, puts an end to litigation, and has the effect of *res judicata* (*Road Accident Fund v Taylor supra* par 36 and 45-46; *Mafisa v RAF supra* par 42). Van der Merwe JA held further that in instances where the parties to litigation indicate they have reached a compromise, the court will not have power or jurisdiction to make further enquiries as to whether the compromise was justified on the merits of the matter or was validly concluded. When the parties request the court to make a settlement agreement an order of court, it has the power to do so. In exercising this power, the court has to consider whether it would be appropriate to incorporate the terms of the compromise into an order of court (*Road Accident Fund v Taylor supra* par 51; *Mafisa v RAF supra* par 42).

The SCA considered the earlier decision of that court in *Maswanganyi v Road Accident Fund* ([2019] ZASCA 97; 2019 (5) SA 407 SCA), where the applicant had reached a settlement agreement with the RAF, and had asked the High Court to make their settlement agreement an order of court. In that case, the High Court declined to do so on the basis that it was not persuaded that the insured driver was negligent (*Maswanganyi v Road Accident Fund supra* par 3). On appeal, the applicant argued that the trial court's jurisdiction had been terminated when the parties concluded their settlement (*Maswanganyi v Road Accident Fund supra* par 8). Weiner AJA stated that when the parties reach a settlement but wish the settlement to be confirmed by the court in the form of a consent order, they do not withdraw the case from the judge, but ask that it be resolved in a particular way. When the consent order is granted, it has the effect of resolving the pleaded issues and possibly issues that are related "directly or indirectly to an issue or *lis* between the parties" (*Maswanganyi v Road Accident Fund supra* par 15). Weiner AJA stated further that the jurisdiction of the court to resolve the pleaded issues does not terminate when the parties arrive at a settlement of those issues. If the jurisdiction of the court did terminate, the court would

have no power to grant an order in terms of the settlement agreement (*Maswanganyi v Road Accident Fund supra* par 15; *Mafisa v RAF supra* par 43).

In *Road Accident Fund v Taylor* (*supra*), the court concluded that the decision of the court in *Maswanganyi v Road Accident Fund* (*supra*) contradicts the common-law principle that a compromise extinguishes disputed issues, thereby putting an end to litigation (*Road Accident Fund v Taylor supra* par 48). Furthermore, *Maswanganyi v Road Accident Fund (supra)* goes against the import of the court in *Eke v Parsons (supra*), which stated that:

> "the court's power to make a compromise a settlement agreement arises from a long-standing practice, and not 'from the jurisdiction of the court to resolve pleaded issues' or 'the court's jurisdiction to adjudicate upon the issues in the litigation'." (*Eke v Parsons supra* par 48)

For these reasons, the Supreme Court of Appeal in *Road Accident Fund v Taylor* (*supra*) held that the judgment in *Maswanganyi v Road Accident Fund* (*supra*) was wrong and should not be followed (*Road Accident Fund v Taylor supra* par 49; *Mafisa v RAF supra* par 45).

It must be borne in mind that judicial power, including the power to make settlement orders, derives from the Constitution itself. The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice (s 173 of the Constitution).

In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* ([2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC)), the Constitutional Court described the inherent power:

> "[T]he power conferred on the High Courts, Supreme Court of Appeal and this Court in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction" (*SABC v NDPP supra* par 90; see also *Eke v Parsons supra* par 28).

In *Mafisa v RAF* (*supra*), the High Court had been presented with a settlement agreement, which it was asked to make an order of court. The court did not divulge to the parties its concerns in respect of the proposed quantum of damages. Instead, it indicated that it needed time to consider the settlement. This was on 12 May 2021. The judgment of the court was delivered on 15 June 2021 (*Mafisa v RAF supra* par 47). The parties were not at any stage given an opportunity to address the court's concerns. In fact, they were not aware of any concerns and were surprised by the outcome. This approach by the High Court is in contradiction to the obligation on courts to hear the parties before making an order that is adverse to them (*Mafisa v RAF supra* par 47). Substantive justice, within the context of a court giving the parties an opportunity to be heard, is about ensuring that no adverse decision prevails against anyone whose side of the

story has not been heard on the issue(s) central to that decision. It would therefore be a travesty of justice to make or confirm any adverse determination against anybody in circumstances where their version is unknown to the decision-maker (*Mafisa v RAF supra* par 47). The court's failure in this regard was in contravention of the *audi alteram partem* principle (*Public Protector v President of the Republic of South Africa* [2021] ZACC 19; 2021 (6) SA 37 (CC); 2021 (9) BCLR 929 (CC) (*Public Protector*) par 178–179; *South African Football Union v President of South Africa* 1998 (10) BCLR 1256; *South African Roads Board v Johannesburg City Council* 1991 (4) I (A); see also Hoexter and Penfold *Administrative Law in South Africa* 3ed (2021) 538–556*;* Peach *The Application of the Audi Alteram Partem Rule to the Proceedings of Commissions of Inquiry* (LLM thesis, North-West University, Potchefstroom Campus) 2003; par 47).

According to Mhlantla J, judges should not interfere with the terms of a settlement agreement. A judge is, however, entitled to raise concerns in certain circumstances. The concerns contemplated by *Eke v Parsons* (*supra* par 50) are concerns arising from the terms of the settlement agreement itself. A settlement agreement may offend public policy if there is a significant difference between the amount in the settlement agreement and the amount that could reasonably be expected to be agreed on between parties in similar cases, or decided by a court had the matter gone to trial, so as to give rise to a reasonable suspicion that the amount may have been inflated or that there may be corruption involved (*Mafisa v RAF supra* par 50). In the case of settlement agreements relating to damages, unlawfulness would not usually appear *ex facie* the agreement, and so the scope for raising concerns on that ground would be limited. Mhlantla J stated that since the settlement agreement purports to be a settlement of an existing *lis*, a court is entitled to look at the pleadings (*Mafisa v RAF supra* par 50). A judge may, for example, find the terms of a settlement agreement incompetent in law, such as to raise an exceptional circumstance sufficient to alert the parties to the judge's concerns. Furthermore, if, for example, a settlement agreement includes heads of damages that are not the subject of a claim in the particulars of claim, this could be questioned (*Mafisa v RAF supra* par 50). The same would be true, according to Mhlantla J, if the settlement involves the payment of an amount exceeding the pleaded claim, because then it would not seem to be a settlement (*Mafisa v RAF supra* par 50). Nonetheless, even in these circumstances, courts do not have free rein and must exercise restraint to ensure that there is no undue imposition on contractual freedom.

Mhlantla J found that in the present matter, the court was presented with a settlement to be made an order of court. If the court were disinclined to do so, the parties should have been informed of its concerns and given the opportunity to consider their position and whether they wished to address the issues raised. However, the caveat here, as provided by Mhlantla J, was that there would have to have been admissible evidence before the court, which was not the case here. The High Court, in reaching its conclusion, had regard to the information obtained from the expert reports in the court file, which were never placed as evidence before it. The High Court found the industrial psychologist's report unpersuasive and held that it failed to prove that the applicant sustained damages with respect to past and future loss of

earnings. The High Court went on to refuse the agreed award for loss of earnings and, as a result, ignored the warnings of the SCA set out in *Motswai v Road Accident Fund supra* par 45–46). In *Mafisa*, there was no live dispute between the parties. Mhlantla J found that the parties had settled their litigious dispute, thereby terminating the court's authority or jurisdiction to pronounce on it. According to Mhlantla J, as the validity and terms of the compromise were not in dispute, it was not open to the court to pronounce on it either (*Mafisa v RAF supra* par 53).

Mhlantla J was of the view that the High Court exceeded its jurisdiction when it unilaterally amended the settlement agreement. The High Court's unilateral alterations to the agreement were improper (*Mafisa v RAF supra* par 54); there was no hearing since the parties had settled the dispute between them. Furthermore, it was improper and irregular for the High Court to have considered the actuarial and industrial psychologist's reports in order to reject the agreed settlement for loss of earnings, as those reports were not properly before the court. According to Mhlantla J, the High Court also failed to raise its concerns with the applicant and the RAF to enable them to decide whether to provide additional material in an effort to persuade the judge or elect not to do so (*Mafisa v RAF supra* par 54). If the High Court had raised its concerns, the parties could have had the opportunity to address the court's concerns if they wished to do so. If the parties had in fact raised concerns or queries, the High Court would then be empowered to refuse to make the settlement an order of court on any of the grounds established by the court as provided for in *Eke v Parsons* (*supra*; *Mafisa v RAF supra* par 54).

7 Concluding remarks

The practice of making settlement agreements is well-established and has existed for a long time in South African law (see *Van Schalkwyk v Van Schalkwyk supra* 95). The tradition of making such orders will continue to feature strongly in our legal system in the future. It is submitted by the writers that this is indeed the correct approach. This is especially because the use of settlement agreements in our courts is designed for the expeditious finalisation of litigation. It is in the interests of justice that litigants in all types of matters, including those in RAF litigation, are able to resolve their matters in a relatively short period of time (Baboolal-Frank and Naude "An Evaluation of Alternative Dispute Resolution Mechanisms in the African Region" 2024 45(1) *Obiter* 1). The judgment of the Constitutional Court in *Mafisa v Road Accident Fund* (*supra*) emphasises the importance of settlement agreements in our legal system and the judicial restraint that is required by judges when called upon to engage with these agreements. The judgment provides guidelines regarding the power of judges to alter settlement agreements, and underlines the importance of procedural fairness and adherence to the separation of powers. Our courts have a responsibility to ensure that agreements freely entered into by parties should be considered sacrosanct, and a court should only intervene in exceptional circumstances where the agreement is contrary to public policy or law (see *Barkhuizen v Napier supra).*

The Constitutional Court in *Mafisa v Road Accident Fund* (*supra*) indicated that if a judge has concerns about the content and nature of a proposed settlement agreement, then the judge may either: a) refuse to make the settlement agreement an order of the court; or b) inform the parties of their concerns in relation to the content of the agreement. It is not open to a judge to demand that the parties address these concerns (*Mafisa v RAF supra* par 51). Once the judge has informed the parties of their concerns, the parties have a choice whether to address those concerns raised by the judge. In instances where the parties elect not to address the concerns, then the parties must inform the judge of their decision and that they regard the matter as settled between them (*Mafisa v RAF supra* par 51). In these instances, the judge must make a 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 the court. Where the parties do take the advice of the judge and seek to address the concerns, the settlement agreement will be made an order of the court. This will be done only if the judge is satisfied that those concerns have been addressed adequately. If the judge is not satisfied, then the judge will be acting within their power to decline to make the settlement agreement an order of court (*Mafisa v RAF supra* par 51). However, the fact that a 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, the law and public policy (*Mafisa v RAF supra* par 51). It is not open to a judge to amend a settlement agreement unilaterally because of their concerns. The right to a fair public hearing requires the judge in the matter to apprise the parties of their concerns so that these can be addressed. A judge's failure to raise their concerns with the parties, and failure to allow them an opportunity to address these concerns, is contrary to the obligation to hear the parties before making an order that is adverse to them (see Hoexter and Penfold *Administrative Law in South Africa* 538–556). Where a judge raises concerns, the grounds thereof should be clear and may not be based on information retrieved from inadmissible evidence (*Mafisa v RAF supra* par 52). The court indicated that when a judge is presented with expert or other evidence in a court file, it is imperative for the interests of justice that the evidence be properly placed before the court so that it can be tested and scrutinised (*Mafisa v RAF supra* par 52).

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