IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.

DATE _____ SIGNATURE _____

CASE NO: 64167/2017

In the matter between:

UBISI, M. K. Plaintiff

and

ROAD ACCIDENTS FUND Defendant

JUDGMENT

MBONGWE, J:

INTRODUCTION

[1] This is an application for leave to appeal against the whole of the judgment and order of this court handed down on 1 August 2022 to the Full Court of this division, alternatively to the Supreme Court of Appeal. Leave to appeal is sought in terms of the provisions of Sections 16 (1) (a) (i) read with Section

17(1) (a) (i) and / or Section 17(1)(a) (ii) of the Superior Courts Act 10 of 2013, and in terms of Rule 49 (1) (b) of the Uniform Rules of this Court.

SUMMARY OF THE FACTS

[2] The plaintiff, 36 years old at the time, was the driver of a motor vehicle on 5 September 2015 travelling along the R510 in Northam, Rustenburg when another motor vehicle ('the insured') travelling in his opposite direction drove onto the plaintiff lane in an attempt to overtake a motor it was following. The insured vehicle collided with the plaintiff's vehicle.

[3] At the hearing of the matter on 5 June 2019 the court ordered a separation of the determination of the issues of merits and quantum in terms of Rule 33(4). The merits were determined to be 100% in favour of the plaintiff and the determination of all other heads of the plaintiff's claim was postponed *sine die.*

INJURIES

[4] The main injury sustained by the plaintiff in the collision was a fracture of the femur for which he was hospitalised and received medical treatment which included the insertion of a fixation in the fracture site**.** He spent a combined period of approximately six months for the hospitalisation and recuperation at home.

RESUMPTION OF DUTIES

[5] At the time of the accident the plaintiff was a holder of a mining degree and employed by a mining company as an underground mining supervisor. Upon his return to work and as a result of his inability or difficulties to perform his duties, which entailed long hours of walking and the navigation of uneven terrain, the plaintiff was moved from his pre - accident position to a position that allowed him to work on the surface of the ground.

MEDICO – LEGAL EXAMINATIONS AND REPORTS

PLAINTIFF'S EXPERTS

[6] As part of the preparations for the hearing of his claim against the defendant, the plaintiff was examined by no less than five experts ('plaintiff's expert

witnesses'), and an Actuary. All these experts examined the plaintiff and compiled their respective medico – legal reports on his injuries, addressing the impact thereof particularly his employment and employability. It is important to state that the medico – legal examinations occurred at least some two years after the plaintiff had returned to work. Equally important is to state that each of the plaintiff's experts deposed to an affidavit regarding the contents of their respective reports. By agreement between the parties the affidavits constituted evidence before the court.

DEFENDANT'S EXPERTS

[7] The defendant employed an orthopaedic surgeon and an occupational therapist as its experts who also examined and compiled medico –legal reports to enable the defendant to assess the impact, if any, the injuries sustained may have on the plaintiff's employment and his income earning capacity / employability. These aspects in particular were adjudicated upon by this court and, though not alone, are at the heart of this application for leave to appeal.

[8] The defendant had filed its experts' reports which were not supported by sworn affidavits to be admitted as evidence. In any event, the defendant's defence had been stuck out when the matter was heard in court. The evidence as per the reports of the plaintiff's experts was, as a result, uncontested in court.

PLAINTIFF'S WHOLE BODY IMPAIRMENT

[9] The examinations and medico legal reports of the plaintiff by his expert witnesses occurred in 2019 and 2021, the latter being the most recent in the determination of the plaintiff's WPI. That is, the assessments were done approximately four and six years, respectively, after the accident had occurred.

[10] The plaintiff was reported to have had united femoral fracture with no residual complications. His whole person impairment (WPI) was rated at six (6) percent. In his report dated 19 July 2019 caselines 008 -2) under the heading 'Serious Injury – The Narrative Test', Dr Marin (Orthopaedic Surgeon)

qualified the plaintiff for general damages in terms of criteria 1, that is, "Serious long-term impairment or loss of a body function;"**.** Two years later in a report by Dr Schutte dated 30 May 2021 determined the plaintiff's whole person impairment to be 12% (caselines 008-84). What stands out in the two reports is that the plaintiff did not qualify to claim general damages in terms of the provisions of the Act, his injuries being below the threshold of 30% stipulated in section 17(1) of the Act.

[11] The plaintiff was, however, qualified by his expert orthopaedic surgeon for general damages in terms of the Narrative Test. The plaintiff's experts in particular, opined that as a result of the injury the plaintiff's competiveness in the open labour market will be compromised and further indicated that he would in future require a sympathetic employer to earn an income. It is this projected situation of the plaintiff that formed the basis for qualifying him to a claim for general damages and future loss of income / reduced income earning capacity under the Narrative Test.

THE SETTLEMENT AGREEMENT

[12] Based on the assessments of the plaintiff set out in para 4, above, an offer dated 25 November 2021 was made on behalf of the defendant in settlement of the plaintiff's claim as follows:

General damages	R500 000.00
Loss of earnings	R2 049 830,20
Future medical expenses	Undertaking sec 17(4)
Cost Contribution	Taxed – High Court
Total	R2 549 830.20

[13] The above offer was accepted by the plaintiff's attorneys and resulted in the settlement agreement that the court was asked to make an order of the court – a request the court refused to accede to for reason that the some terms of the settlement agreement were at odds with and not supported by collateral evidence obtained by the plaintiff's Industrial Psychologist (IP) and recorded in her a medical –legal report which constituted evidence before the court and

was referred to and relied upon during the hearing. Hereunder I point out the relevant aspects of the report as quoted in the main judgment.

PLAINTIFF'S INDUSTRIAL PSYCHOLOGIST'S REPORT

[14] The Industrial Psychologist's (IP) report, by and large, constitutes a summary of the reports and conclusions of other experts employed by a party, comments on the other party's IP report and, importantly, contains collateral information the plaintiff's IP obtained from the plaintiff's employer. It is, as was the case in the present matter, usually the plaintiff's immediate superior who represents the employer in matters such as the present.

[15] This court perused the reports of the plaintiff's (appellant) experts, particularly the report of his IP. The relevant portions of that report have been quoted in the main judgment and are repeated hereunder;

[16] In her report, the Industrial Psychologist at page 0008-41 on caselines, states that the plaintiff had progressed in 2017 from his pre-accident position of Underground Mine Supervisor to Section Manager. The IP report further refers to information the IP had obtained from Mr Van den Berg, the plaintiff's senior and Mine Manager, who reported that "*based on his ability and qualifications*," the plaintiff would progress to the position of Production Manager in about 3 to 5 years' time and that the plaintiff only needed to gain experience. With regards to her interview with Mr Van den Berg, the IP states in her report dated 21 October 2019 at page 008-49 on caselines:

> *"Mr Van den Berg stated that after the accident he could see that the claimant struggled a bit, however it seems that he has recovered and it does not seem that he has any negative effects from the injuries sustained from the accident. Mr Van den Berg indicated that the claimant is performing well and that he has the potential to progress further. He stated that the next position for him to grow into is a Production Manager, of which the claimant already has the required qualification (as it is the same qualification required for Section Manager). He noted that this qualification is a Mine Manager Certificate*

of Competency which is issued through the DMR (Department of Mineral Resources). Mr Van den Berg stated that he would however require more or less between 3-5 years of experience (technical and practical) in order to be able to apply for this position. Mr Van den Berg stated that the normal retirement age is 60 years and early retirement is 55 years." The IP's report is dated 21 October 2019.

[17] The plaintiff's legal representatives would have read the medico legal reports when quantifying the plaintiff's claim for general damages and future loss of income/income earning capacity and should, during that process, have reasonably understood the implications of the information in the preceding paragraphs, being that the plaintiff had progressed in his carrier post the accident and was in line for further progression to the more senior position of Production Manager in 3 to 4 years. In addition, as recently 2021 the plaintiff's attorneys had commissioned and received the report of Dr Schutte referred to above which confirmed that the plaintiff's WPI was below the threshold of 30%. Simply put, the settlement agreement was concluded despite the clear evidence that the plaintiff did not qualify under section 17 of the Act, the AMA and the Narrative Test for general damages and loss/reduced income earning capacity. The settlement agreement was therefore improper and not warranting endorsement by the court.

[18] The plaintiff's progression in 2017 and the envisaged further promotion in 3 to 4 years contradicts and, in fact, vitiates the adverse projections of his future employability. In particular, the plaintiff had already not only progressed when the IP's report was compile following the examination, but he was qualified and in line for promotion to the position of Production Manager "*based on his ability and education",* according to Van den Berg.

THE SETTLEMENT AGREEMENT

[19] How the IP's report turns the plaintiff's carrier trajectory for worse with the possibility of extinction as a result of the injury sustained in the accident is mysterious. This misleading projection improperly qualified the plaintiff to a claim for general damages and a future loss of income or reduced income

earning capacity in the settlement amounts of R500 000 and R2 049 830.20, respectively, to the prejudice of the RAF and the public purse.

FINDINGS AND ISSUES

[20] It was found that the agreement of settlement was invalid for the reason stated in the preceding para 19. The applicant's legal representatives would without doubt have read the expert reports, including the IP's report, to quantify the applicant's claim. To this end it can reasonably be expected that they became aware that the plaintiff did not qualify for a claim for general damages and future loss of earnings. To pursue the claim under the two heads of damages is fraudulent. As an officer of the court the plaintiff's counsel had the duty to assist the court and not to try as hard as he did, to have the settlement agreement endorsed by the court. The court's initial engagement with counsel on the settlement of general damages proved to be long drawn resulting in the decision to reserve judgment that was later handed down and is the subject of the present application for leave to appeal.

NOTABLE

[21] It is remarkable that not even an attempt has been made to challenge the court's findings on the contents of the IP's report.

[22] It is regrettable that while it was indicated in para [15] of the main judgment that "*Save for the section 17(4) Undertaking and whatever portion of his (plaintiff), income that was not paid in the six months he had not been able to resume work……",* the order of the court did not reflect that the plaintiff was entitled to payment of his proven past loss of earnings. I am of the view that this oversight may be cured by an appropriate amendment of the order in terms of Rule 42 once the exact amount of the plaintiff's past loss of earnings is disclosed to avoid the expense of an appeal only on the omission in the orders.

GROUNDS OF APPEAL

[23] The applicant's argument is buttressed on the misconception that the court has no say, but to endorse a settlement agreement entered into by the parties and presented to it. This misconception is founded on yet another, namely, that a settlement agreement ends the *lis* between the parties and, therefore, deprives the court of jurisdiction on the matter before it. These contentions persist despite extant legal principles to the contrary. In the majority decision of the judges of the Supreme Court of Appeal in the matter of *Patronacia Maswanganyi obo Teboho Machimane v Road Accident Fund* (1175/2017) [2019] ZASCA 97 (18 June 2019) para [19] the court said the following:

> "[19] *The fundamental premise of the argument on the application was that the settlement agreement put an end to the lis between the parties and thus deprive the court of any further jurisdiction. That premise has been shown to be incorrect. The court's jurisdiction was unaffected by the agreement, as evidenced by the fact that it was being asked both to adjudicate on the application and (once more) to make the agreement an order of court. This relief was being sought in the very action where it was claimed that the court had been deprived of its jurisdiction. The basis for this application – absence of jurisdiction- was therefore inconsistent with the relief being sought, which was that the same court, in the same action, should grant the relief prayed in the application. In order to grant that relief the court must have retained jurisdiction in the action. The settlement agreement had not put an end to it."*

[24] Under the sub-heading "The settlement agreement", from paragraph 27, the circumstances under which the court may refuse to make a settlement agreement an order of court are dealt with and include, *inter alia*, instances where the terms of the agreement:

24.1 are unconscionable, illegal or immoral;

24.2 do not accord with the Constitution and the law;

24.3 are at odds with public policy (*Eke v Parson* [2015] ZACC 30; 2016 (3) SA 37 (CC) At paras 25 and 26 of the judgment the court continued:

"*[25] The courts have wide power to regulate their own affairs – ''The power in s 173 of the Constitution 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. [This] does not mean any settlement order proposed by the parties should be accepted. The court must still act in a stewardly manner that ensures that its resources are used efficiently. After all, its* "*institutional interest…are not subordinate to the wishes of the parties". Where necessary, it must insist that the parties effect necessary changes to the proposed terms as a condition for the making of the order," It may even reject the settlement outright'' [Eke v Parson* paras 25 -28, 34] (own emphasis).

"[26] *As the full court in this matter held, a court cannot act as a mere rubber stamp of the Parties.''* (para [33] line 1 of the *Patronacia Maswanganyi,* supra) and, at para "[35] *In cases involving the disbursement of public funds, judicial scrutiny may be essential. A judge is enjoined to act in terms of s 173 of the Constitution to ensure that there is no abuse of process. Judges in all divisions have expressed concern that in many RAF cases, there is an abuse of process. Settlements are concluded where, for example, the substantial damages agreed to bear no relation to the injuries sustained."* (*Mzwakhe v Road Accident Fund* [2017] ZAGP JHC 342 paras 23-25).

[25] In the present matter, the settlement of general damages and future loss of earnings was in contravention of all the principles referred to above. The court is enjoined to prevent the abuse of its process and to protect the public purse by the exercise of its authority in terms of section 173 of the Constitution.

CRITERIA FOR GRANTING LEAVE TO APPEAL

REQUIREMENTS FOR GRANTING LEAVE TO APPEAL

[26] The criteria for granting leave to appeal are contained in the provisions of sections 17(1) and 16(2)(a)(i) of the Superior Courts Act 10 of 2013, ('the

Act'). In terms of section 17(1) the court may only grant leave to appeal where it is convinced that:

(a) the appeal would have a reasonable prospect of success; or

(b) there is some other compelling reason why the appeal should be heard, including the existence of conflicting decision on the matter under consideration; or

(c) the decision on appeal will still have practical effect (section 16(2)(a)(i), and

(d) where the decision appealed against does not dispose of all the issues in the case, and the appeal would lead to a just and prompt resolution of all the issues between the parties.

[27] In *Zuma v Democratic Alliance* [2021] ZASCA 39 (13 April 2021) the court held that the success of an application for leave to appeal depends on the prospect of the eventual success of the appeal itself. In The *Mont Chevaux Trust v Tina Goosen and Others* 2014 JDR 2325 LCC the court held that section 17(1)(a)(i) requires that there be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against before leave to appeal is granted.

> "*An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."* (See: *MEC For Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016).

APPEAL TO THE SUPREME COURT

[28] Leave to appeal is sought herein to the Supreme Court of Appeal or the full bench of this division. Section 17(6)(a) of the Act makes it mandatory for a judge granting leave to appeal to direct that the appeal be heard by the full bench of the particular division the matter was heard in. Leave to appeal to

the Supreme Court of Appeal may only be granted if the decision appealed against entails an important question of law or a decision of the Supreme Court of Appeal is necessary to resolve differences or conflicting decisions, or the administration of justice necessitates a decision by the Supreme Court of Appeal. None of these considerations has been shown to exist to justify leave to appeal to the Supreme Court of appeal.

CONCLUSION

[29] I can find nothing in the applicant's case that would entitle it to the granting of leave to appeal under the provisions of section 17 of Act 10 of 2013. In particular the negative finding on the appellant's legibility to claim for general damages and future loss of earnings precludes the court from endorsing a settlement agreement that suggests otherwise. The settlement agreement sought to be made an order of the court clearly lacks legitimacy – a factor the court cannot turn a blind eye to. There are no reasonable prospects that another court would come to a different conclusion and, consequently, no prospects of success in the appeal. The application for leave to appeal ought to be refused for this reason alone (See: *MEC For Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016).

ORDER

[30] Resulting from the findings and conclusion in this judgment, the following order is made:

1. The application for leave to appeal is dismissed.

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M P N MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARRANCE

For the applicant	Advocate NGD Maritz SC
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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON ……APRIL 2023.