CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 214/14

In the matter between:

KEVIN JOHN EKE Appellant

and

CHARLES HENRY PARSONS Respondent

Neutral citation: *Eke v Parsons* [2015] ZACC 30

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ

Judgments: Madlanga J (main): [1] to [52]
Jafta J (concurring): [53] to [76]

Heard on: 26 May 2015

Decided on: 29 September 2015

Summary: Settlement agreement — status of orders made pursuant to settlement agreements — terms become an enforceable court order — finality of court orders

Summary judgment — Rule 32 of Uniform Rules of Court — rules governing the court process should not be disregarded — courts may depart from a strict observance of the rules in the interests of justice — substance ahead of form

Section 34 of the Constitution — access to court — settlement orders that exclude raising defences — defences were effectively raised — unsatisfactory assessment of defences does not amount to denial of right of access to court

ORDER

On appeal from the Eastern Cape Local Division of the High Court, Port Elizabeth:

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MADLANGA J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Molemela AJ and Tshiqi AJ concurring):

[1] This is an appeal against the judgment and order of Nhlangulela ADJP in the Eastern Cape Local Division of the High Court, Port Elizabeth (High Court).[1] It concerns a settlement agreement that was made an order of court. In the main, it raises questions as to the status of settlement agreements that have been made orders of court and what terms may or may not be contained in those agreements.

[2] In 2010 Mr Kevin John Eke, the appellant, agreed to purchase the membership interest of Mr Charles Henry Parsons, the respondent, in a close corporation, Chezel Trading No 4 CC, for R7 775 000 (sale agreement). Acting in terms of the sale agreement, Mr Eke nominated the Kevin Eke Family Trust (Trust) as purchaser. He bound himself as surety and co-principal debtor for the obligations of the Trust.

[1] *Charles Henry Parsons v Kevin John Eke and Others* Case no 1324/2013 (High Court judgment).

[3] Mr Eke defaulted on his payments under the sale agreement. He did not remedy this breach even after Mr Parsons had sent a letter of demand. On 14 May 2013 Mr Parsons instituted proceedings in the High Court claiming the balance of the purchase price in the sum of R5 million. When Mr Eke entered an appearance to defend the action, Mr Parsons applied for summary judgment. On the doorstep of the Court, the parties entered into a settlement agreement. That agreement was made an order of court by Schoeman J on 16 July 2013 (settlement order). The settlement order reads:

> "IT IS ORDERED: (By Agreement)
>
> 1. That, in reaching the agreement set out herein, the Defendant acted both in his personal capacity as well as in his representative capacity as trustee and duly authorised representative of the Kevin Eke Family Trust (the 'Trust').
> 2. That the application be and is hereby postponed *sine die*.
> 3. That the Plaintiff is granted leave to amend the particulars of claim within twenty one days of date hereof, to introduce the Trust (duly represented by its trustees for the time being), as a further Defendant in the matter; and to increase the sum claimed to the sum of Rl0.3 Million Rand, referred to below, together with interest at the rate of 9% per annum from date hereof.
> 4. That in settlement hereof the Defendant agrees to pay to the Plaintiff the sum of R10.3 million Rand (Ten Million, Three Hundred Thousand Rand) in the manner set out below, together with interest thereon at 9% (nine percent) per annum from date hereof, plus the Plaintiff's cost hereof, as taxed or agreed.
> 5. That the Defendant shall pay to the Plaintiff the sum of R500 000.00 (Five Hundred Thousand Rand) within ten days of date hereof, such payment to be effected into the trust account of the Plaintiff's Johannesburg attorneys . . .
> 6. That the Defendant shall effect payment of a further sum of R500 000.00 (Five Hundred Thousand Rand), in the aforesaid manner, within thirty days of date hereof.
> 7. That the Defendant shall make a further payment of R1 500 000.00 (One Million Five Hundred Thousand Rand), in the aforesaid manner, within sixty days of date hereof.

8. That the balance of the Defendant's outstanding indebtedness . . . shall be paid at a rate of R500 000.00 (Five Hundred Thousand Rand) per month. The first instalment thereof shall be paid on the last day of the month following the due date for payment of the R1.5 million in terms of paragraph 7 above; thereafter, in the aforesaid manner, with each payment to be made before or on the last day of every successive month.

. . .

16. That should the Defendant fail to comply timeously with any of his obligations set out herein, both in respect of the payments to be made and in respect of the securities to be supplied and registered, the Plaintiff will be entitled to enrol the summary judgment application for hearing forthwith, claiming from both the Defendant and the Trust, then the outstanding balance, interest and costs.

17. That the outstanding sum payable for purposes of the said application shall be proven by way of a supplementary affidavit by the Plaintiff, indicating the outstanding balance at the time.

18. That the Defendant agrees, in both aforesaid capacities, not to oppose the said application for summary judgment.

19. That the parties agree that neither the Plaintiff's amendment of the particulars of claim, nor this settlement (which shall not constitute a novation), nor the filing of the further supplementary affidavit referred to above, will compromise the Plaintiff's entitlement to seek the order for summary judgment in terms of clause 16 above."

[4] In the event, Mr Eke breached the payment terms under the settlement order. Mr Parsons enrolled the summary judgment application in terms of clause 16 of the settlement order. He sought payment of the balance outstanding under the settlement order in the sum of R7.3 million, plus interest totalling some R440 000.00. He filed a supplementary affidavit, as contemplated in paragraph 17 of that order. Mr Eke, who had since replaced the legal representatives who were assisting him when he agreed to the terms of the settlement, opposed this application. He raised the following defences:

(a) The settlement order was an agreement governed by the National Credit Act[2] (NCA). That being the case, a notice ought to have been issued in terms of section 129 of the NCA. Since it was not issued, the application was premature.

(b) The sale agreement was the *causa* (underlying reason or cause)[3] for the settlement agreement. As he had bound himself as surety for the Trust's obligations, there was no underlying *causa* against him in his personal capacity to pay the amount owing under the subsidiary settlement agreement, which more than doubled the amount of R5 million allegedly owing by him as surety.

(c) "The contents of the [settlement] order, in so far as it [was] a subsidiary agreement to the [sale agreement],"[4] disclosed no cause of action against him in his capacity as trustee of the Trust. In the alternative, the increased liability under the settlement order amounted to an unenforceable penalty in terms of section 2(2) of the Conventional Penalties Act.[5]

(d) The clause of the settlement order that barred him from opposing the summary judgment application was *contra bonos mores* (contrary to good morals) and unenforceable.

(e) Despite not being entitled to do so in terms of either the Uniform Rules of Court (Uniform Rules) or the settlement order, Mr Parsons had delivered a further affidavit. A related point was that, in addition to Mr Parsons' perceived lack of competence to file it, the further affidavit verified only the amount owing and not, as the Uniform Rules require, also the cause of action.[6]

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[2] 34 of 2005.

[3] Hutchison and Pretorius (eds) *The Law of Contract in South Africa* (OUP, Cape Town 2010) at 447.

[4] High Court judgment above n 1 at para 10(c).

[5] 15 of 1962.

[6] High Court judgment above n 1 at para 10(a)-(e).

[5] Nhlangulela ADJP who heard the application rejected all these defences.

[6] As his grounds of appeal to us, Mr Eke raised the defences to the summary judgment application set out above.[7] There were some additional arguments. I need mention only one, which is one of the issues on appeal. Mr Eke argues that rule 32 of the Uniform Rules does not permit a second summary judgment application and that the parties could not have validly bypassed this legal bar by means of a settlement agreement. It is not necessary to detail the other contentions because of the approach this Court adopted. The Court granted leave to appeal only on certain limited issues. These are—

(a) the status and effect of making a settlement agreement an order of court;
(b) the permissibility in terms of rule 32 of the Uniform Rules to have brought a second summary judgment application based on the settlement agreement; and
(c) whether the provision in the settlement agreement that Mr Eke was not to oppose the second summary judgment application is enforceable having regard to section 34 of the Constitution.

[7] I address these issues in turn.

The status of the settlement agreement

[8] It becomes necessary to resolve this issue because – in part – the stance adopted by Mr Eke seeks to question the very essence of the settlement order. Let me preface the discussion with this. The practice of making settlement agreements is well-established and has existed for a long time in South Africa. In *Van Schalkwyk* the Court said "[t]he tradition of such orders is very strong in our legal system".[8]

[7] Mr Eke approached this Court after his applications for leave to appeal brought before the High Court and Supreme Court of Appeal were unsuccessful.

[8] *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) at 95.

[9] The crux of Mr Eke's submission is:

> "In the present instance, the intention of the parties is clear, namely that the agreement which was reached did not constitute a final judgment or order upon being recorded in an order of court, more especially since the respondent, upon any breach of the agreement by the appellant, was entitled to do no more than proceed with his application for summary judgment which had been postponed *sine die*. The respondent was not entitled to execute on the order as same constituted no more than a recordal of their settlement."[9]

[10] Mr Parsons argues the opposite: the effect of the settlement order is to vest the terms of the settlement agreement with the status of an order of court. He concedes that there may be instances where this does not hold true, but that it is patently clear that this particular settlement order is not such an instance. In fact, he contends, the summary judgment application was settled on the basis that the settlement agreement between him and Mr Eke would be made an order of court.

[11] Mr Eke relies heavily on the judgments of *Thutha*[10] and *Tasima*.[11] *Thutha* concerned a divorce settlement that had been made an order of Court by the Eastern Cape High Court, Mthatha. Its terms dealt with a variety of matters, notably: the award of custody of the minor children to the wife; provision for the children's maintenance by the husband; a specified contribution towards the expenses of the wife's household; a requirement for the transfer of ownership of two motor vehicles by the husband to the wife; and that the husband should transfer a residential property to the minor children. The wife brought an application asking that the husband be held to be in contempt of an order of Court. The basis was that he had failed to comply with his obligations under the divorce settlement. For his part, the husband denied non-compliance.

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[9] Appellant's Written Submissions at para 14.

[10] *Thutha v Thutha* 2008 (3) SA 494 (TkH).

[11] *Tasima (Pty) Ltd v Department of Transport and Others* [2013] ZAGPPHC 69; 2013 (4) SA 134 (GNP) (*Tasima*).

[12] The Court dismissed the application because the terms of the settlement that were at issue were incapable of performance. The reason given was that "a court order must be effective, enforceable and immediately capable of execution by the sheriff, his deputy or members of the South African Police Service".[12] The Court continued: only an order *ad pecuniam solvendam* (for the payment of a sum of money) or *ad factum praestandum* (for the performance of a specific act) satisfies this requirement.[13] Depending on the nature of the order, enforcement for non-compliance may take the form of execution or contempt proceedings.[14] As a rule, terms of settlement agreements that may be enforced as orders in one of these two ways only after the success of some subsequent antecedent litigation must not be incorporated in a court order.[15]

[13] For its approach, *Thutha* relies on the practice in KwaZulu-Natal. Its essence is captured in *Claassens*:

> "Here, as a rule, the Court simply orders the parties on request to do what they have promised, to the extent that such lends itself to a command, falls within its jurisdiction, and is otherwise unobjectionable. It spells this out, by and large choosing its own words. Seldom does it even mention the agreement. But the parts used as material for its order are converted into one in that way, no less surely and much more precisely. For the rest, the litigants must look to their contractual rights, which hold no immediate interest for it."[16]

[14] There is nothing wrong with taking the terms of a settlement agreement and casting them in the form of an order. Questions arise though. Must a court be this formalistic; why must it cut the terms out of the agreement and paste them onto its

[12] *Thutha* above n 10 at para 15.

[13] Id at para 53(5).

[14] Id at para 53(5)-(6).

[15] Id at para 54.

[16] *Claassens v Claassens* 1981 (1) SA 360 (N) at 363E-F.

order? Why can't it simply say the agreement, or those of its terms that do lend themselves to being part of a court order, are made an order of court? Insofar as one is aware, the less formalistic option is the usual practice in most divisions of the High Court of South Africa. Of course, if a court sanctions only some of the terms of a settlement agreement, it would have to identify them clearly. I return to all this later.

[15] *Thutha* expresses an aversion to courts being used as registries for what in essence are parties' contractual obligations. On this it calls in aid another KwaZulu-Natal case. That case, *Mansell*,[17] concerned a request by parties in divorce proceedings that a settlement agreement be made an order of Court. One of the terms of the settlement agreement stipulated that, post the divorce, the husband was to pay maintenance to the wife. The Court held:

> "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 . . . 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. This principle appears . . . to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation."[18]

[17] *Mansell v Mansell* 1953 (3) SA 716 (N).

[18] Id at 721B-F.

[16] The Court in *Mansell* then concluded that, for two reasons, it could not grant the parties' request. First, on the authority of *Hodd*,[19] the Court lacked competence to make an order in respect of the provision for maintenance as, to do so, would have meant that the Court was being a mere "registry of obligations".[20] As will become clear shortly, the underlying reason for this was that at that time there was no rule of substantive law – whether statutory or in terms of the common law – that made it possible for a spouse to claim maintenance from the other after their divorce. Second, the granting of the order would be of "no practical or legitimate advantage" as it could not be enforced.[21] In context, "enforcement" meant being able to "proceed direct to execution".[22] In the Court's view, this was not the case with the proposed order.

[17] As the Court observes in *Le Grange*, the contexts in which *Mansell* and *Thutha* were decided are different.[23] As a result, *Thutha* should not have been decided without paying due regard to the context in which *Mansell* was decided.[24] Van Zyl ADJP sets out this context well. I can do no better than to recite his words:

> "[T]he source of the Court's authority to make a settlement agreement an order of court in divorce proceedings, regulating the proprietary consequences of the divorce and the payment of maintenance to a former spouse, is now to be found in the provisions of section 7(1) of the Divorce Act [70 of 1979]. The purpose and importance of this subsection are locked up in its history and the reason for its existence as part of the Divorce Act. It replaced section 10(1)(b) of the Matrimonial Affairs Act [37 of 1953] which was enacted with the aim of removing the uncertainty that had been caused by the full bench decision in the then Natal Provincial Division in *Hodd*, and an earlier decision in the Free State in *Schultz v Schultz*. In *Hodd* the Court held that an agreement between spouses in a divorce action which provided for

[19] *Hodd v Hodd; D'Aubrey v D' Aubrey* 1942 NPD 198 (*Hodd*).

[20] *Mansell* above n 17 at 721B-C.

[21] Id at 721H.

[22] Id at 721C-D.

[23] *Ex Parte Le Grange and Another In re: Le Grange v Le Grange* [2013] ECGHC 75 (*Le Grange*) at para 22. In the South African Law Reports, this is reported as *PL v YL* 2013 (6) SA 28 (ECG).

[24] Id.

the maintenance of a former spouse could not be made part of the decree of divorce. This finding was based on the view that at common law the reciprocal duty of support which exists between spouses during the existence of the marriage comes to an end upon the dissolution thereof.

As a result the Court in *Hodd* held that any agreement relating to the payment of such maintenance was not based on any antecedent right to receive maintenance after the divorce, and that as such it was not capable of representing any agreed settlement or compromise of any claims arising from the action:

> 'although it will undoubtedly give effect by way of orders to rights recognised by the law, and to agreed settlements and compromises based upon those rights . . . some cause of action, or recognised legal right to invoke the assistance of the Court, must exist before the Court will make any order, except, perhaps dismissing the proceedings.'

This finding is premised on the adversarial model on which dispute resolution is based in our law, namely, that the Court's mandate or jurisdiction is determined by the *lis* [lawsuit] between the parties. The Court's authority in other words does not extend beyond the issues which the action is capable of raising, and which the parties themselves have raised in their pleadings. It follows that if there exists no duty to maintain, and therefore no antecedent right to claim maintenance after the marriage has been dissolved, it is not an issue which the Court may competently decide and rule on in its judgment and the order issued pursuant thereto.

To do so would mean that the Court, in the words of Selke J, adopted by Broome JP in *Mansell*, would act as 'a mere registry of documents or agreements'. The result of this was that the courts refused to make settlement agreements which provided for maintenance after the dissolution of the marriage an order of the court, unless it could be found to constitute an agreement 'on a claim relating directly or indirectly, wholly or in part, to proprietary rights by one or other of the spouses.'"[25] (Footnotes omitted.)

[25] Id at paras 23-5. For completeness, the citation of *Schultz*, which is one of the two cases within the quote, is *Schultz v Schultz* 1928 OPD 155. The second case, *Hodd*, appears above n 19.

[18] In sum, *Thutha* and *Mansell* turned on the fact that at the time, there was no rule of substantive law that required a spouse to provide maintenance for the other after the marriage had been dissolved. By the time *Thutha* was decided, in terms of section 7(1) of the Divorce Act a court granting a decree of divorce could now "in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other".[26] Thus the fundamental basis for the decision in *Hodd* and *Mansell* had fallen away. It is this that the Court in *Thutha* did not take into account in deciding as it did. It is so that *Thutha* does touch on the effect of section 7(1) of the Divorce Act.[27] But the judgment does not seem to appreciate the importance of the different earlier legal position to the conclusion reached in *Mansell*.

[19] The *Thutha* approach is formalistic and takes a narrow view of the efficacy and value of court orders granted as a result of settlement agreements. In certain instances, agreement – or lack of it – on certain terms may mean the difference between an end to litigation and a protracted trial. Negotiations with a view to settlement may be so wide-ranging as to deal with issues that, although not strictly at issue in the suit, are related to it – whether directly or indirectly – and are of importance to the litigants and require resolution. Short of mere formalism, it does not seem to serve any practical purpose to suggest that these issues should be excised from an agreement that a court sanctions as an order of court.

[20] That formalistic approach may have at least two consequences. The parties may be forced to have a separate agreement containing the rejected terms which is not part of the court order.[28] Worse still, the settlement agreement may have been conditional upon being made an order of court. Upon the rejection of some of its

[26] 70 of 1979.

[27] Above n 10 at para 38.

[28] The effect would be the same even if the agreement remains exactly the same as that presented to court, with some of its terms not having been accepted.

terms by the court, the entire agreement may crumble. The result may well be the resumption of contested litigation. Does that benefit anybody? Not the parties and not the court.

[21] *Claassens*[29] captures the essence of a settlement and what may inform it well:

> "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."[30]

Although this was said in the context of maintenance in matrimonial disputes, it applies with equal force to other types of suits.

[22] Surely then, an expedited end to litigation may not only be in the parties' interest, it may also serve the interests of the administration of justice. This finds support at common law. *Le Grange* quotes Huber with approval:

[29] Above n 16.

[30] Id at 371A-C.

> "A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits."[31]

[23] *Le Grange* says:

> "[T]he policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system. By disposing of cases without the need for a trial, the case load is reduced. This gives the Court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently.
>
> . . .
>
> If one is then to proceed from the premise that the wider interests under consideration [are those] of the administration of justice, then the Court is required, when exercising its discretion whether to make a settlement agreement an order of the court, to give consideration not only to the need to make orders that are readily enforceable, but also to assess the wider impact which its order may potentially have."[32]

[24] Whilst ordinarily the purpose served by a settlement order is that, in the event of non-compliance, the party in whose favour it operates should be in a position to enforce it through execution or contempt proceedings, the efficacy of settlement orders cannot be limited to that.[33] A court may choose to be innovative in ensuring adherence to the order. Depending on the nature of the order, it may – for example – first issue a *mandamus* for compliance. Failing compliance, it may then consider

[31] *Le Grange* above n 23 at para 34 quoting the English translation of Huber by Gane *The Jurisprudence of My Time* 5 ed (Butterworth & Co (Africa) Ltd, Durban 1939) vol 1 at 481, para 3.15.15. In Hutchison and Pretorius above n 4 at 447 the authors say a "compromise [is] the settlement of a disputed claim by agreement between the parties".

[32] *Le Grange* id at paras 36 and 38.

[33] Id at para 39.

committal for contempt.[34] Both the *mandamus* and order for committal may be sought by merely supplementing the papers already before court. On the *Thutha* approach, the terms of the settlement agreement not incorporated by the court in the settlement order can only be enforced by means of a full-blown fresh suit.[35] The disadvantages of this need no elaboration.

[25] This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper.[36] 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".[37] Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. On this *Hodd* says:[38]

> "[I]f two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to Court to have that agreement made an order, merely on the ground that they preferred the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies against possible breaches, it seems clear that the Court would not grant the application."[39]

That is so because the agreement would be unrelated to litigation.

[26] Secondly, "the agreement 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

[34] Id at paras 39-40.

[35] See id.

[36] Id at para 15.

[37] Id.

[38] Above n 19 at 204.

[39] Id.

order".[40] That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy.[41] Thirdly, the agreement must "hold some practical and legitimate advantage".[42]

[27] The less restrictive approach adopted in this judgment is in line with the wide power that courts have to regulate their process. This power is expressed in section 173 of the Constitution, which provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[28] This is what this Court has said about 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."[43]

[29] Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

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[40] *Le Grange* above n 23 at para 15.

[41] Id. On what we measure public policy against, see *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*) at paras 28-9; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 56; *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 110; and *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) at para 91.

[42] *Le Grange* above n 23 at para 15.

[43] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) (*South African Broadcasting Corp*) at para 90.

> "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."[44]

[30] This is equally true of court orders following on settlement agreements, of course with a slant that is specific to orders of this nature:

> "The Court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement. . . .
>
> The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the Court 'in the armchair of the author(s)' of the document. Evidence of 'surrounding circumstances' is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide 'sufficient certainty'."[45] (Footnotes omitted.)

[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties;

[44] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (*Finishing Touch 163*) at para 13. See also *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

[45] *Engelbrecht and Another v Senwes Ltd* [2006] ZASCA 138; 2007 (3) SA 29 (SCA) at paras 6-7.

the *lis* becomes *res judicata* (literally, "a matter judged").[46] It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order.[47] That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a *mandamus*.[48]

[32] Litigation antecedent to enforcement[49] is not necessarily objectionable. That is so because ordinarily a settlement agreement and the resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute, which – depending on the nature of the litigation – might have entailed many days of contested hearing.

[33] Does the mere fact of coming back to court for the determination of issues arising from alleged non-compliance with a settlement order duplicate the use of court resources? No. Not all settlements where enforcement has to be preceded by litigation result in the envisaged antecedent litigation. In fact, according to *Le Grange*, the truth is that fewer matters settled in these terms end up in litigation. In *Le Grange* the Court held:

> "From experience, and having discussed the matter with my colleagues at the other courts in this division, I hold the view that considering the large number of divorce matters which are finalised by the granting of consent judgments, it is only in a very

[46] The principle is that generally parties may not again litigate on the same matter once it has been determined on the merits.

[47] Above at [23].

[48] *Le Grange* above n 23 at para 21.

[49] That is, enforcement either in the form of execution or proceedings for committal for contempt of court.

> small percentage of cases where parties do return to court to complain of non-compliance with the terms of their settlement agreements."[50]

Even though this was said in the context of divorce settlements, it would seem to be true of other settlements as well. Also, the Eastern Cape Division of the High Court that the Court is referring to cannot possibly be an outlier not representative of what is happening elsewhere in the country. What this tells us then is that even settlement orders that envisage litigation that precedes enforcement are still to the benefit of courts.

[34] The less restrictive approach that I prefer 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 interests . . . are not subordinate to the wishes of the parties".[51] Where necessary, it must "insist that the parties effect the necessary changes to the proposed terms as a condition for the making of the order".[52] It may even reject the settlement outright.

[35] A settlement order that makes provision for payment of a judgment debt by instalments does not become unacceptable only because payment is to be in instalments. With an order of this nature, proceeding straight to execution may not be practical because what remains owing may first have to be quantified. That is what necessitates another approach to court. Is that objectionable? I think not.

[36] In sum, what all this means is that even with the possibility of an additional approach to court, settlements of this nature do comport with the efficient use of judicial resources. First, the original underlying dispute is settled and becomes *res judicata*. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third,

[50] *Le Grange* above n 23 at para 47.

[51] Id.

[52] Id.

matters that culminate in litigation that precedes enforcement are fewer than those that don't.

[37] Turning to the present matter, the appellant's attempt to undo the settlement agreement, in the main, on the authority of *Thutha*[53] and *Tasima*[54] cannot succeed. The terms of the settlement order[55] created clear obligations with which Mr Eke had to comply. The terms also unambiguously spelt out consequences for non-compliance with these obligations: Mr Parsons would be entitled to claim the full outstanding amount by re-enrolling the summary judgment application. This step was necessitated by the nature of what the parties had agreed upon. Had the settlement simply provided for the payment of a lump sum, Mr Parsons would have been entitled immediately to execute upon Mr Eke's failure to satisfy the judgment debt. The underlying basis for Mr Eke's liability under these obligations is *res judicata*; Mr Eke cannot seek to re-open it.

[38] Accordingly, I can find no basis to disagree with the High Court's finding that the settlement agreement is final in its terms and that Mr Parsons is entitled to approach a court for enforcement of that order in accordance with the procedure set out in it.

Rule 32 of the Uniform Rules

[39] This issue concerns Mr Eke's complaint that the re-enrolled summary judgment application[56] was legally incompetent; this, because rule 32 of the Uniform Rules allows the filing of only one summary judgment application. Mr Eke argues that the *causa* for the re-enrolled summary judgment application was not the same as that of

[53] Above n 10.

[54] Above n 11. The Court in *Tasima* at para 69 said – in so many words – that it was placing a lot of reliance on *Thutha*. That means, to the extent that the reasoning in *Tasima* is similar to that in *Thutha*, it too must be dismissed on the same basis on which *Thutha* has been rejected.

[55] Set out at [3].

[56] This application was re-enrolled in terms of para 16 of the settlement order.

the earlier summary judgment application. As a result, he continues, the re-enrolled application was essentially a second summary judgment application. Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules.[57] Not surprisingly, courts have often said "[i]t is trite that the rules exist for the courts, and not the courts for the rules".[58]

[40] Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing.[59] The second is to "secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice".[60] I have already touched on the inherent jurisdiction vested in the superior courts in South Africa.[61] In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons,[62] including catering for

[57] See, for example, *Leibowitz and Others v Schwartz and Others* 1974 (2) SA 661 (T) and *Mostert NO v Sable Group Holdings (Pty) Ltd In re: Mostert NO v Sable Group Holdings (Pty) Ltd and Others* [2013] ZAGPJHC 143 (*Mostert*).

[58] *Arendsnes Sweefspoor CC v Botha* [2013] ZASCA 86; 2013 (5) SA 399 (SCA) (*Arendsnes*) at para 18, citing *Republikeinse Publikasies (Edms.) Bpk. v Afrikaanse Pers Publikasies (Edms.) Bpk.* 1972 (1) SA 773 (A) at 783A-B; *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); and *Ncoweni v Bezuidenhout* 1927 CPD 130 (*Ncoweni*).

[59] *Arendsnes* id at para 19.

[60] Id, relying on *Kgobane and Another v Minister of Justice and Another* 1969 (3) SA 365 (A), which dealt with this concept in the context of the number of condonation applications that were being received by the Appellate Division at the time, which Rumpff JA decried at 369H as a "tendency [which] must be reduced in order to ensure that the administration of justice is maintained on a proper level".

[61] At [28].

[62] See generally Taitz *The Inherent Jurisdiction of the Supreme Court* (Juta and Co Ltd, Cape Town 1985) at 14-8.

circumstances not adequately covered by the Uniform Rules,[63] and generally ensuring the efficient administration of the courts' judicial functions.[64]

[41] Where the parties themselves, through a settlement agreement reached with legal representatives present on each side, prefer to dispense with the strictures of a rule and request that the court recognise this preference by means of a consent order, for one party suddenly to perform a *volte-face* and demand strict adherence with that self-same rule borders on the ludicrous. Justice between the two litigants demands that their settlement agreement, which was made an order of Court, must be given effect. After all, a court's duty is to do justice between litigants.[65] In this instance, justice demands that Mr Eke be held to his bargain.

[42] In the circumstances of this case, it matters not that rule 32 does not provide for the enrolment of a second summary judgment application. Mr Eke's contentions in this regard cannot succeed. Substance must be put ahead of form.

Undertaking not to oppose

[43] This last issue relates to paragraph 18 of the settlement agreement where Mr Eke "agrees . . . not to oppose the . . . application for summary judgment". The complaint is that – in the face of section 34 of the Constitution – this is unenforceable. Section 34, entitled "Access to courts", provides:

[63] See, for example, *De Wet and Others v Western Bank Ltd* 1977 (2) SA 103 (W), which identified the ability of courts in the then Natal Province to order rescission of judgments even though no relevant rule allowing for such an order existed at the time.

[64] Taitz above n 62 at 14. This principle appears to date to *Ncoweni* above n 55, where Gardiner JP remarked at 130 that "[t]he Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go so far as I can in granting orders which would help to further the administration of justice". It was referred to recently in, amongst others, *Arendsnes* above n 55 at para 19; *ABSA Bank Limited v Lekuku* [2014] ZAGPJHC 274 at para 22; and *Mostert* above n 57 at para 13.

[65] Compare *Federated Employers Fire & General Insurance Co. Ltd. and Another v McKenzie* 1969 (3) SA 360 (A).

> "Everyone has the right 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."

[44] Our courts have long recognised the detrimental effect of parties, by way of agreement, preventing each other from having a dispute heard by a court of law.[66] The common law rightfully recognises that agreements of that nature may offend public policy.[67] This was expressed thus by the Appellate Division in *Schierhout*:

> "If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land."[68]

[45] On the right of access to court, this Court has said in *Lesapo*:

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance."[69] (Footnote omitted.)

[46] In *Barkhuizen* Ngcobo J said that "[s]ection 34 . . . not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy".[70] Is this an appropriate case in which these principles can be invoked? Although, on their face, the terms of the settlement agreement prevented Mr Eke from

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[66] *Schierhout v Minister of Justice* 1925 AD 417 (*Schierhout*) at 424 and *Nino Bonino v De Lange* 1906 TS 120 at 123-4.

[67] *Barkhuizen* above n 41 at para 34.

[68] *Schierhout* above n 66 at 424.

[69] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 22.

[70] Above n 41 at para 33.

raising even *bona fide* defences to the re-enrolled summary judgment application, the factual reality is that he did raise defences.[71] Mr Parsons, in turn, has not attempted to enforce paragraph 18 of the settlement order. It is manifest from the High Court judgment that Mr Eke was afforded the full opportunity to ventilate his disgruntlement before that Court. He raised the full gamut of defences. The High Court considered and dismissed them all.

[47] While it may be said that some of the defences were not dealt with in any detail, there is no basis to say the High Court did not apply its mind to Mr Eke's contentions. What disagreement Mr Eke has amounts to no more than a complaint against what he perceives to be an unsatisfactory assessment of his defences. That is a far cry from being denied access to court.

[48] After all, the right of access to court is about being afforded an opportunity for a legal dispute to be determined fairly and in accordance with the court process. Although a party exercising this right may be hoping for what she or he believes to be the correct outcome, the right is not about, nor does it guarantee, a correct outcome.[72]

[49] In the circumstances, the complaint that the settlement agreement denied Mr Eke access to court has no merit.

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[71] In the context of the settlement order, examples of *bona fide* defences that could have been available are that Mr Eke had not in fact breached the terms of the settlement order; or that the amount owing stated on affidavit by Mr Parsons was incorrect.

[72] See *Lane and Fey NNO v Dabelstein and Others* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 4 where this Court held:

> "Even if the [Supreme Court of Appeal] erred in its assessment of the facts, that would not constitute the denial of the ['right to a fair trial and to fair justice']. The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled."

It is the applicants themselves who had characterised the right as a right to "a fair trial and to fair justice". See also *Van der Walt v Metcash Trading Limited* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) at para 14.

Conclusion

[50] The upshot is that Mr Eke has not succeeded on any of the three grounds on which leave to appeal was granted. In the result, his appeal must fail.

Costs

[51] Nothing militates against the rule that costs should follow the result.

Order

[52] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

JAFTA J (Nkabinde J and Theron AJ concurring):

Introduction

[53] I have read the judgment prepared by my colleague Madlanga J (main judgment). I agree with most of what is said in it and the order it proposes. In particular I agree with the conclusion that a "settlement order" brings about finality to litigation and gives rise to *res judicata*. I also agree that such an order is enforceable just like any order issued by a court and that the route followed to enforce it depends on the nature of the order granted. But my approach differs from the main judgment in relation to the applicability of rule 32 of the Uniform Rules to the present proceedings as well as on whether the provision that Mr Eke was prohibited from opposing the application was enforceable against him.

[54] But before I set out my reasons for a different approach, it is necessary to outline the background against which this case must be decided. The crisp question raised here is whether the application that served before Nhlangulela ADJP amounted to a fresh summary judgment or whether it was a re-enrolment of the summary

judgment proceedings that were postponed by Schoeman J in terms of the order granted on 16 July 2013. Bearing this issue in mind helps in placing the contentions advanced by Mr Eke in proper context.

Context

[55] Forming part of that context is the nature and effect of the order of 16 July 2013 and the terms of that order.[73] To appreciate the nature and effect of that order, we must trace the origins of the power to make it. In this regard, the judgment of Nhlangulela ADJP is instructive.[74] It traces the judicial power to convert settlement agreements into a court order to the common law inherent power of superior courts. Presently that power is located in section 173 of the Constitution.[75]

[56] As observed by this Court in *South African Broadcasting Corp*,[76] the exercise of that inherent power may be interfered with on appeal on narrow grounds only. The Court described the power conferred by section 173 as a "discretion in the strict sense" and held that it may interfere with the exercise of that power if the court that exercised it did not act judicially, based its decision on wrong principles of law or misdirected itself on material facts.[77]

[57] It is the inherent power sitting in section 173 which enables superior courts to convert settlement agreements of litigants into court orders. As stated in the main judgment, such orders have a status equal to every court order and have legal force equivalent to that of other orders of court. This means that the High Court was wrong

[73] The full order is reproduced in para 3 of the main judgment.

[74] High Court judgment above n 1 at para 6, which refers to *Van Schalkwyk* above n 8.

[75] Section 173 provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice."

[76] *South African Broadcasting Corp* above n 43 at para 39.

[77] Id at para 40-1.

to hold in cases like *Thutha*[78] and *Tasima*[79] that there is a class of court orders, based on settlement agreements, which are not enforceable as court orders and are regarded as nothing more than a recordal of the parties' agreement.

[58] Therefore the order issued on 16 July 2013 must be examined in the context that it did not amount to a recording of the parties' settlement agreement. It was a court order clothed with legal force which did not depend on the parties' contractual obligations. Nor could it be taken as merely reinforcing those obligations.

[59] Since finality to litigation is the main purpose of a court order, court orders must not be expressed in ambiguous and contradictory terms. For a court order to be complied with, parties on whom the order applies must know what it requires them to do. Clarity in framing a court order also helps the process of enforcing it. Execution is one of the methods of enforcing court orders and it applies to orders for the payment of money or delivery of a particular object. If the court order is not clear, execution cannot be effected. The order granted on 16 July 2013 is a classic example of an order that has contradictory terms.

Effect of the order of 16 July 2013

[60] It will be recalled that what was placed before the High Court on 16 July 2013 was a summary judgment application. Mr Parsons sought an order directing Mr Eke to pay a fixed sum of money which was a debt owing in terms of the parties' sale agreement. Mr Parsons launched the summary judgment application because in his view, Mr Eke did not have a valid defence on the basis of which he could oppose the claim. Indeed the parties' settlement agreement that was made an order of court confirmed this.

[78] *Thutha* above n 10 at para 31.

[79] *Tasima* above n 11 at para 54.

[61] In the agreement, Mr Eke consented to the claim being increased to R10.3 million which he promised to pay in instalments. The first instalment of R500 000 was to be paid to Mr Parsons' attorneys within 10 days from 16 July 2013. He further promised to pay a sum of R500 000 within 30 days and a further amount of R1.5 million within 60 days. Mr Eke bound himself to pay the balance in monthly instalments of R500 000, after the expiry of 60 days from the date of the order.

[62] As was anticipated by the parties, he failed to make the necessary payments. This being an order for payment of money, ordinarily it should have been enforced by means of execution which is a step taken after the finalisation of litigation. This could not happen because the order itself spelt out that Mr Parsons had to re-enrol the summary judgment application in the event of a failure to pay, as if there was no order directing payment. It is not apparent from the papers why the High Court granted such an unusual order. The peculiarity of this order was exacerbated by the term that precluded Mr Eke from opposing the re-enrolled summary judgment.

[63] An objective reading of the order illustrates that the High Court had accepted that the dispute between the parties had been settled. If Mr Eke had complied with the order and made all the payments timeously, there could have been no case to consider later. But, if the order did not require Mr Parsons to re-enrol the summary judgment in the event of a failure to pay, he could have enforced it by means of execution. It is therefore not clear to me what the purpose of postponing the summary judgment was and requiring Mr Parsons to re-enrol it should Mr Eke fail to pay. This is more so because the order represented the intention of the High Court and not that of the parties, hence when interpreting a court order, the purpose is to ascertain the intention of the Court.[80] A court may not grant an order with an obscure purpose.

[64] The rule of law requires not only that a court order be couched in clear terms but also that its purpose be readily ascertainable from the language of the order. This

[80] *Finishing Touch 163* above n 44 at para 13.

is because disobedience of a court order constitutes a violation of the Constitution.[81] Furthermore, in appropriate circumstances non-compliance may amount to a criminal offence with serious consequences like incarceration.[82] In *Pheko* Nkabinde J remarked:

> "The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*."[83] (Footnotes omitted.)

[65] The order of 16 July 2013 lacked the hallmarks of a court order. It did not bring the case to finality. Nor was it capable of enforcement. Instead, it required litigation to continue in circumstances where no discernible purpose was to be attained by the continuation of the specific litigation. The order itself demonstrated beyond doubt that Mr Eke had no defence to the claim. Over and above that the order prohibited him from opposing the re-enrolled application. What was done here did not constitute an efficient use of scarce judicial resources. A case that could have been finalised by one judge ended up being decided by two judges. Moreover, every case that is set down for hearing in our courts blocks out other cases which could have been set down for hearing in its place.

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[81] Section 165(5) provides:

> "An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[82] *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No 2) [2015] ZACC 10; 2015 (6) BCLR 711 (CC) (*Pheko*) at para 28. See also *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 6.

[83] *Pheko* id at para 30.

[66] In the circumstances the order of 16 July 2013 did not accord with an efficient case flow management. It fell within the High Court's inherent power to determine the terms of the order it wished to grant and to ensure that it was couched in clear language and was enforceable. There appears to be no reason why the order did not bring this litigation to finality. Had Mr Eke made full payment of the judgment debt, it is not clear what could have happened to the postponed summary judgment application. But despite these shortcomings, the High Court issued a court order on 16 July 2013 which was binding on the parties. This answers the first question on which leave to appeal was granted.

Rule 32

[67] The question whether under rule 32 it was permissible for Mr Parsons to bring a second summary judgment application did not arise because Mr Parsons did not institute a second application. Therefore, the contention by Mr Eke that rule 32 does not permit a second summary judgment is misguided. What occurred here is that Mr Parsons acted in terms of the order of 16 July 2013 and re-enrolled the summary judgment when Mr Eke defaulted. What was enrolled before Nhlangulela ADJP was not a second summary judgment application. Accordingly rule 32 did not apply to a course of action undertaken in terms of the court order of 16 July 2013.

Enforceability of settlement agreement

[68] Mr Eke further argued that the settlement agreement was not enforceable because the clause that prohibited him from opposing the summary judgment was inconsistent with section 34 of the Constitution. This argument too was misconceived. When Mr Parsons re-enrolled the summary judgment he did not act in terms of the parties' settlement agreement. Instead he acted in terms of the court order. The parties' agreement had been converted by the High Court into its own

order when the order was issued. The parties' settlement was novated by operation of law.[84]

[69] The wide inherent power vested in superior courts includes the power to prohibit litigants from having access to courts under certain circumstances. For example, where the litigant institutes vexatious proceedings or abuses the court process. It can never be contended that an order that forbids an abusive litigant from having access to court is against public policy. In *Barkhuizen*[85] this Court was concerned with a constitutional challenge on a contractual clause that limited one of the parties' right of access to courts.

[70] Here it is apparent that Mr Eke misconstrued the basis on which Mr Parsons re-enrolled the summary judgment application. Mr Parsons acted in terms of the court order and not the underlying settlement agreement which had been novated by the order of 16 July 2013.

[71] It must be emphasised here that the High Court was concerned with summary judgment proceedings which are an extraordinary procedure, specifically designed for an expeditious finalisation of litigation. A summary judgment may be granted only where the court is satisfied that the defendant has no defence to the claim. Even so, the granting of the judgment is discretionary. For the defendant to resist judgment, she may give security or file an affidavit, disclosing her defence and material facts relied upon.[86]

[72] Summary judgment is limited to claims of the nature specified in rule 32(1).[87] Notably, orders issued in respect of each of those claims are enforceable by means of

[84] *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A); [1978] 2 All SA 121 (A) and *Mv Tirupati*: *Mv Ivory Tirupati and Another v Badan Urusan Logistik* (*aka Bulog*) [2002] ZASCA 155; 2003 (3) SA 104 (SCA).

[85] *Barkhuizen* above n 41.

[86] Rule 32 of the Uniform Rules.

[87] Rule 32(1) provides:

execution, carried out by the sheriff. In these circumstances, it is difficult to see any value in the approach followed here by the High Court. All that the Court needed to do was to grant summary judgment if it was satisfied that the defendant had no defence or refuse it if he had a defence. If the Court was minded to postpone the case, then it should not have granted an order that directed Mr Eke to pay the judgment debt. What was done here does not accord with rule 32.

Essential features of an order

[73] A court order must bring finality to the dispute or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance. In cases where, as here, the order deals with the parties' property rights which are subject to protections guaranteed by section 25 of the Constitution, a court granting the order is duty bound to issue an appropriate and effective order.[88] The order of 16 July 2013 was not effective because it was not enforceable. In the event of non-compliance Mr Parsons was required to re-enrol the application for another order. It was also not appropriate to postpone the summary judgment application in circumstances where Mr Eke had conceded liability to pay and had promised to pay the debt in instalments. It was apparent from the circumstances of the case that Mr Eke had no defence against the claim. Moreover, the order itself forbade him from opposing the re-enrolled application.

[74] If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said

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"Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only—

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment,

together with any claim for interest and costs."

[88] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851.

that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person on whom it applies, the discretion to comply or disregard it. In *Lujabe*[89] Molahlehi AJ said:

> "The issue that arises in a case where the settlement agreement has been made an order of [c]ourt and in the context of contempt proceedings is whether such an order is executable or enforceable. The basic principle is that for an order to be executable or enforceable its wording must be clear and unambiguous. An order that lacks clarity in its wording or is vague is incapable of enforcement. The other basic principle is that the order should as soon as it is made, be readily enforceable. In other words, the order must give finality to the dispute between the parties and not leave compliance therewith to the discretion of the party who is expected to comply with such an order."[90] (Footnotes omitted.)

[75] Therefore, when a court considers granting an order based on the parties' settlement agreement, it must ensure that the order it issues has all the necessary features of a court order. If the order issued does not have the key elements of an order, the court would have failed to exercise its discretion properly. But the improper exercise of the discretion does not free parties on whom the order applies from complying with it, to the extent that they may ascertain what it requires them to do.

[76] It is for these reasons that I support the order dismissing the appeal with costs, including the costs of two counsel.

[89] *Lujabe v Maruatona* [2013] ZAGPJHC 66.

[90] Id at para 17.

For the Appellant:	P Scott SC instructed by Liston & Brewis Attorneys.
For the Respondent:	J Huisamen SC instructed by Kaplan Blumberg Attorneys.