CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 156/22

In the matter between:

TUMELO MAFISA Applicant

and

ROAD ACCIDENT FUND Respondent

and

PERSONAL INJURY PLAINTIFF LAWYERS ASSOCIATION Amicus Curiae

Neutral citation:	*Mafisa v Road Accident Fund and Another* [2024] ZACC 4
Coram:	Zondo CJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ
Judgment:	Mhlantla J (unanimous)
Heard on:	18 August 2023
Decided on:	25 April 2024
Summary:	Road Accident Fund — settlement agreement — High Court's unilateral alteration of settlement agreement irregular and improper

ORDER

On appeal from the High Court of South Africa, Free State Division, Bloemfontein:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and is replaced with the following:
   "The draft order marked "X" is made an order of court."
4. There is no order as to costs.

JUDGMENT

MHLANTLA J (Zondo CJ, Kollapen J, Mathopo J, Rogers J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ concurring):

Introduction

[1] Persons injured in a motor vehicle accident are entitled to claim damages against the Road Accident Fund (RAF), an organ of state created in terms of section 2(1) of the Road Accident Fund Act[1] (Act), provided that they are able to establish fault on the part of the driver. The RAF will assess the claim and decide whether to admit or dispute liability. Where liability is admitted, it will decide on the quantum of damages to be offered.[2] Before 1 June 2020, claims were dealt with by a panel of attorneys appointed by the RAF in terms of service level agreements. Thereafter, the RAF terminated the

[1] 56 of 1996.

[2] The quantum of damages offered is determined based on an assessment of serious injury by a registered medical practitioner which provides the basis for determining claims for future medical treatment and future loss of income or support. The method of assessment to determine whether a serious injury was incurred is set out in the Road Accident Fund Regulations GN R770 and 771 *GG* 31249, 21 July 2008.

mandate of its panel attorneys.[3] Since that time, claims for damages against the RAF have been dealt with and, where appropriate, settled by the claims handlers.

[2] Since the RAF terminated the mandate of its panel attorneys, there have been complaints by claimants that claims are not attended to or finalised timeously and that, in certain instances, the RAF has been the cause of delays. There have also been allegations of the inflation of claims and the submission of claims that did not have merit. In some cases, when Judges were approached to make RAF settlement agreements orders of court, they were reluctant to accede to the requests as they perceived that many of the claims and the settlements agreed upon were inflated.[4] In certain instances, some Judges have refused to grant the orders unless evidence was adduced to substantiate the agreed amount and/or liability. In others, where the High Courts were not satisfied, the terms of the settlement agreement were unilaterally altered. As a result, Judges of the various Divisions of the High Court have found themselves acting as "guardians" or "custodians" of the public purse.

[3] The application before this Court is one of those cases where the High Court unilaterally altered the terms of a settlement agreement. It is an application for leave to appeal against a judgment and order of the High Court of South Africa, Free State Division, Bloemfontein (High Court).[5] In essence, this application concerns whether a court may unilaterally amend a settlement agreement concluded by the litigating parties.

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[3] The termination of these service level agreements (SLAs) is discussed in *Road Accident Fund v Mabunda Incorporated; Minister of Transport v Road Accident Fund* [2022] ZASCA 169; [2023] 1 All SA 595 (SCA).

[4] See *Mzwakhe v Road Accident Fund*, unreported judgment of the High Court of South Africa, Gauteng Division, Johannesburg, Case No 24460/2015 (26 October 2017) (*Mzwakhe*) at paras 22 and 26. In *Mzwakhe*, the High Court was asked to make a settlement agreement an order of court. The Judge considered the medico-legal reports in the court file and decided, on the documents before her, that the applicant was not entitled to any amount for loss of earnings. Consequently, she refused to make the settlement agreement an order of court, referred the case back to the Registrar for the purpose of pleadings to be filed and interdicted the RAF from paying the applicant "any amount in settlement of the entire claim without a court order first being obtained". See also *Maswanganyi v Road Accident Fund* [2019] ZASCA 97; 2019 (5) SA 407 SCA (*Maswanganyi*); *MT v Road Accident Fund; HM v Road Accident Fund* 2021 (2) SA 618 (GJ) and *Ketsekele v Road Accident Fund* 2015 (4) SA 178 (GP).

[5] *Mafisa v Road Accident Fund*, unreported judgment of the High Court of South Africa, Free State Division, Bloemfontein, Case No 3064/2018 (15 June 2021) (*High Court judgment*).

Parties

[4] The applicant is Mr Tumelo Mafisa. The RAF was cited as the only respondent in these proceedings and filed a notice to abide. As a result, this Court directed a request to the General Council of the Bar of South Africa (Bar Council) to appoint counsel to assist the Court by preparing written submissions and making such arguments as they deemed or felt proper in support of a High Court's power to investigate the merits of a settlement. The Bar Council nominated Mr N Snellenburg SC as the Court appointed counsel. The Court appointed counsel filed written submissions as directed by the Court and made oral submissions at the hearing. The Court wishes to extend its gratitude to Mr Snellenburg SC for his assistance.

[5] The Personal Injury Plaintiff Lawyers Association (PIPLA) was admitted as amicus curiae in these proceedings. In terms of its submissions to this Court, PIPLA purports to represent the interests of approximately 400 legal practitioner members who represent or assist persons who have been injured in motor vehicle accidents.

Background

[6] On 31 January 2016, Mr Mafisa, who was 29 years old at the time, was a passenger in a motor vehicle when the driver of the vehicle collided with a tree. As a result, Mr Mafisa suffered bodily injuries which included a fracture of the left proximal humerus, abrasions of the lower back and lacerations of the scalp. He suffered damages in the form of medical expenses, loss of earnings and general damages. According to him, the accident was caused by the sole negligence of the driver.

Litigation history

High Court

[7] The applicant issued 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. The RAF's attorneys subsequently withdrew as attorneys of record.

[8] The matter was enrolled for hearing on 11 and 12 May 2021 in the High Court before Daniso J. On the first day of the hearing, the parties requested that the matter stand 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.

[9] The parties then approached the Judge and requested her to make the settlement agreement an order of court. The relevant terms of the agreement were as follows:

> "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."

[10] In terms of the agreement, the RAF would also provide an undertaking in terms of section 17(4)(a) of the Act in respect of medical costs and pay Mr Mafisa's taxed costs.[6]

[11] The Judge was in possession of the court file which contained the pleadings, the applicant's expert reports from an industrial psychologist, occupational therapist,

[6] Section 17(4) of the Act outlines the procedures and limits for compensation claims under certain circumstances. For claims involving future accommodation costs in a hospital or nursing home, treatment, or other services or goods, the RAF or its agent can compensate the third party directly after the costs have been incurred and proven or compensate the service provider according to a specified tariff. For claims related to loss of income or support, the compensation amount can be paid either as a lump sum or in agreed-upon instalments. The maximum annual compensation for loss of income or support is capped at R342 336.00 per year per claimant, regardless of the actual loss suffered.

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.

[12] On 15 June 2021, the High Court handed down a written judgment. In its judgment, the Court unilaterally amended the settlement agreement. The High Court stated:

> "Upon examination of the draft order, I was satisfied that the award of damages tendered by the defendant is commensurate to the loss suffered by the plaintiff, except for the loss in respect of earnings. The circumstances under which the defendant made the tender to settle the damages herein were not clear as there was no adequate proof that the plaintiff was employed pre-accident.
>
> No oral evidence was led. The plaintiff relied on the actuarial report by Mr Sauer to quantify the amounts of R206 739.00 and R1 330 829.00 respectively. The calculations are based on the industrial psychologist's report which I find not to be persuasive under these circumstances. It is alleged that during the period 2013 to 2016 the plaintiff was self-employed in his own construction business earning about R2 500.00 per month. Inexplicably, it is also stated that towards the end of 2015, the plaintiff's business was not making enough money, the income was not constant as a result he started looking for work at various construction sites.
>
> It does not end there, the damages claimed by the plaintiff herein are not even pleaded paragraph 6 of the plaintiff's particulars of claim, the plaintiff merely alleged: 'As a result of the injuries which the plaintiff sustained in the aforementioned accident, he suffers *inter alia* the following *sequelae* [condition resulting from a disease or injury]: . . . May have a loss of earnings/earning capacity in future'."[7]

[13] 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 Court refused to award the applicant the agreed quantum of

[7] *High Court judgment* above n 5 at paras 6-8.

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. The Court unilaterally amended the draft order by striking out the amount in respect of loss of earnings and awarded the applicant R350 000.00 in respect of general damages only.

[14] The applicant applied for leave to appeal against the order of the High Court to a Full Court, alternatively to the Supreme Court of Appeal. On 14 December 2021, the High Court dismissed the application with costs.

Supreme Court of Appeal

[15] Aggrieved by the decision of the High Court, the applicant petitioned the Supreme Court of Appeal, but without success. An application to the President of the Supreme Court of Appeal for reconsideration in terms of section 17(2)(f) of the Superior Courts Act[8] suffered a similar fate.

In this Court

Applicant's submissions

[16] The applicant submits that the matter raises two constitutional issues. First, the unilateral alteration of a settlement agreement without affording parties an opportunity to be heard amounts to a procedural and substantive irregularity. In this manner, the applicant submits that his right to a fair hearing was infringed and basic notions of fairness and justice were undermined. The applicant further argues that despite the presence of evidence of the impact of his injuries on his earning capacity, he now faces an impoverished future without the just, reasonable and fair compensation to which he is entitled. He submits that this denial amounts to an infringement of his right to equality and human dignity. The second constitutional issue raised by the applicant is that the High Court discarded its role as impartial arbiter when it stepped into the role

[8] 10 of 2013.

of the Executive as the guardian of public funds, thereby infringing the separation of powers doctrine.

[17] In this regard, the applicant highlights the purpose of a settlement agreement – to bring an end to existing litigation or to prevent or avoid future litigation. The applicant emphasises 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* (a matter already judged) and the Court could not have interfered in the agreement.

[18] The applicant recognises 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 by this Court in *Eke*.[9] According to the applicant, the High Court should have demanded that the parties engage it on aspects that it took issue with instead of amending the settlement agreement by striking out the agreed amount for loss of earnings. Had the parties been granted such an opportunity, an award for loss of earnings would have been made.

[19] The applicant also submits that this matter raises an arguable point of law of general public importance, namely whether a High Court can of its own accord alter a settlement agreement without affording the parties an opportunity to be heard, thereby binding parties to an agreement they did not intend to make. He contends that the High Court essentially became a party to the agreement. The applicant submits that the issues raised are of general public importance as settlement agreements are the norm in RAF litigation and affect scores of other litigants who approach the courts to have settlement agreements made orders of court.

[9] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC).

PIPLA's submissions

[20] PIPLA's submissions are similar to those of the applicant and focus on the Court's jurisdiction in respect of settlement agreements. PIPLA reiterates that jurisdiction is determined by the dispute between the parties and that a compromise, whether embodied in a court order, terminates the litigation between the parties and thus has the effect of *res judicata*. PIPLA argues 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.

[21] Even if there were a dispute between the parties regarding the terms of the settlement agreement, PIPLA argues that the High Court's subjective view as to whether the settlement is reasonable or justifiable is immaterial. In support of this, PIPLA states that a compromise will sometimes be for more than what a court may have ordered, and on other occasions, less. The risk that a compromise may be for more or less than what a court would have ordered is not offensive to public policy or the law. Instead, it is a risk both parties voluntarily assume.

[22] Therefore, PIPLA submits 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. PIPLA argues that 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.

[23] Like the applicant, PIPLA argues that the High Court's unilateral alteration of the settlement agreement amounts to an infringement of the separation of powers doctrine. PIPLA highlights that the RAF is a creature of statute, authorised to settle disputes with claimants. 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 submits 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 RAF, the High Court infringed the applicant's right to equal treatment before the law.

[24] PIPLA accepts that a settlement agreement can only be made an order of court if it is competent and proper. According to PIPLA, the settlement agreement between the applicant and the RAF complied with all three requirements set out by this Court in *Eke*. Consequently, if the High Court were of the view that the terms of the settlement agreement offended any one of those grounds, it should have invited the parties to make submissions before making its decision. By not doing so and instead deciding a dispute that it was not called upon to decide, PIPLA submits that the High Court infringed the parties' right to have their dispute resolved by the application of law decided in a fair public hearing.

[25] PIPLA further argues that, if a compromise is challenged by the court and not the parties themselves, a dispute arises between the parties, on the one hand, and the court, on the other. The court's obligation to be independent and apply the law impartially and without fear, favour or prejudice would impede the court from being able to determine the outcome of that dispute. As the three requirements set out in *Eke* have been met, PIPLA submits that the appropriate relief for this Court to grant is to make the draft order agreed to by the parties an order of court.

Court appointed counsel's submissions

[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, requested that the draft order, which represented the settlement of the matter between them, be made an order of court. The Court appointed counsel submits that he cannot advance submissions in support of a 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. The one exception to this rule,

the Court appointed counsel submits, is the requirement that the best interests of a child are paramount in all matters that involve them.

[27] The Court appointed counsel further argues that a court's power to make a settlement agreement an order of court requires a determination whether it would be appropriate to incorporate the terms of the compromise into an order of court. If a court finds that the requirements of *Eke* 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.

[28] While a court is obliged to deal with the misappropriation of public funds if it is properly raised, the Court appointed counsel submits that courts do not have a general duty or the power to exercise oversight over the expenditure of public funds. The separation of powers doctrine countermands this. The Court appointed counsel submits that the exercise of such power without the issue being raised infringes the right to a fair public hearing and the principle that a court may only decide issues raised by the parties. Ultimately, the perception that a system of state administration is broken, is not a licence for a court to disregard the fundamental principles of procedural or substantive law.

Issues

[29] The issues for determination are:

(a) Whether leave to appeal should be granted?

(b) If so, whether a court is empowered to amend a settlement agreement concluded by the parties?

(c) If a court considers that it should not make a compromise an order of court, what procedures should it follow?

(d) What is the appropriate remedy, if any?

Jurisdiction and leave to appeal

[30] It is common cause between the parties that the High Court failed to apprise the parties of its concerns and then proceeded to unilaterally amend the settlement agreement. The failure to do so implicates the right to a fair public hearing, guaranteed in section 34 of the Constitution.[10] In *Olesitse*,[11] this Court held that the prevention of 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."[12] Accordingly, this Court's jurisdiction is engaged.

[31] A conclusion by this Court that a matter engages its jurisdiction does not lead to a conclusion that the matter must be entertained.[13] This Court must still satisfy itself that it is in the interests of justice to grant leave to appeal. In this regard, the Court must 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.[14] It is imperative that the constitutional issues raised by the present case be determined, due to the prevalence of the cases and the manner in which some of the Divisions of the High Court have dealt with settlement agreements. There are also reasonable prospects of success and, therefore, leave to appeal should be granted.

Appeal: principles relating to compromise

[32] Before dealing with the issues in this matter, it is necessary to consider the legal principles relating to a compromise and set out the nature and extent of a compromise.

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[10] Section 34 states:

> "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."

[11] *Mmabasotho Christinah Olesitse N.O. v Minister of Police* [2023] ZACC 35; 2024 (2) BCLR 238 (CC).

[12] Id at para 36.

[13] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 18.

[14] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 11-2.

[33] A compromise is an agreement between the parties to prevent or terminate a dispute by adjusting their differences by mutual consent. It is trite that a compromise gives rise to new contractual rights and obligations which exist independently of the original cause of action. Once a compromise is reached, the parties are precluded from proceeding on the original cause of action (unless, of course, the compromise provides otherwise).[15]

[34] Inherent in the concept of a compromise is 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. Lawfully struck compromises 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.[16]

[35] The High Court in *Le Grange* cited the statement made by the Appellate Division in *Schierhout*,[17] where it was said that "[t]he law, in fact, rather favours a compromise (*transactio*), or other agreements of this kind; for *interest rei publicae ut sit finis litium* [it is in the public interest that there be an end to litigation]".[18] The court's authority is limited to the issues in the action brought before the court and the issues that the parties have specifically raised in their pleadings.

[36] Contractual agreements concluded freely and voluntarily by the parties ought to be respected and enforced. This is in accordance with the established principle *pacta sunt servanda* (agreements must be honoured). In *Barkhuizen,*[19] this 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

[15] *Road Accident Fund v Ngubane* [2007] ZASCA 114; 2008 (1) SA 432 (SCA) at para 12.

[16] *Eke* above n 10 at para 22 referring to *Ex parte Le Grange In re: Le Grange v Le Grange* 2013 (6) SA 28 (ECG) (*Le Grange*) at paras 34, 36 and 38. In the South African Law Reports, *Le Grange* is reported *sub nom PL v YL*.

[17] *Schierhout v Minister of Justice* 1925 AD 417 (*Schierhout*).

[18] Id at 425.

[19] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

was not served on the insurance company within the time limit set out in the clause.[20] In approaching this question, Ngcobo J, writing for the majority, recognised the importance of giving effect to parties' freedom to contract in a manner that does not override the right of access to courts.[21] 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."[22]

[37] In *Beadica*,[23] the applicants were four close corporations which owned and operated franchises on the respondent's premises.[24] The premises were leased to the applicants for a period of five years, with an option to renew the lease agreement for a further five years.[25] The applicants failed to exercise the renewal option within the required notice period. Despite the applicants having belatedly sought to renew the lease agreement, the respondent demanded that they vacate the premises.[26] The applicants sought an order declaring that the renewal options had been validly exercised and that the respondent be prohibited from taking steps to evict them.[27] Writing for the majority, Theron J explained:

> "The enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness and justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the 'idiosyncratic inferences

[20] Id at para 1.

[21] Id at para 55.

[22] Id at para 57.

[23] *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).

[24] Id at para 2.

[25] Id at paras 5-6.

[26] Id at paras 7-8.

[27] Id at para 10.

> of a few judicial minds'. This would introduce an unacceptable degree of uncertainty into our law of contract. The resultant uncertainty would be inimical to the rule of law."[28]

[38] Therefore, courts should not readily second-guess parties' decision to settle the issues as they defined them in their pleadings.

[39] In *Eke,*[29] the applicant 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. The issue before this Court 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.[30] In particular, this Court had to determine whether a settlement agreement which has 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.

[40] Writing for the majority, Madlanga J cautioned against the notion that anything agreed to by the parties should be accepted by a court when considering whether to make an agreement an order of court. He went on to say 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.[31]

[28] Id at para 81.

[29] Eke above n 10.

[30] Id at paras 1-3.

[31] Id at paras 25-6.

[41] In *Motswai*,[32] the High Court refused to make a settlement agreement between the applicant and the RAF an order of court. In a scathing judgment, the High 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".[33] The High Court referred its judgment to a number of professional bodies, including the Law Society of the Northern Provinces, the Bar Council, and the Health Professions Council to investigate possible professional misconduct.[34] On appeal, the Supreme Court of Appeal held—

> "[t]he wide-ranging findings in the first judgment against individuals who were not called upon to defend themselves cannot stand for this reason alone.
>
> But apart from the irregularity and unfairness of the proceedings before the first judgment, the judge's reasoning is wrong. She drew inferences from the documents that were before her without calling for any further evidence. In this regard, our courts have stated emphatically that charges of fraud or other conduct that carries serious consequences must be proved by the 'clearest' evidence or 'clear and satisfactory' evidence or 'clear and convincing' evidence, or some similar phrase. In my view, the documents before the judge raised questions regarding the efficacy of the claim and the costs incurred in the litigation to date – no more. The judge was entitled – indeed obliged – to investigate these questions and if necessary to call for evidence. But she was not entitled to draw conclusions that appeared obvious to her only from the available documents."[35]

[42] Finally, in *Taylor*,[36] as was the case in *Eke*, the question regarding the consequences of a settlement agreement to a dispute and the powers of a court in relation thereto arose. *Taylor* concerned two actions against the RAF which were settled

[32] *Motswai v Road Accident Fund* [2014] ZASCA 104; 2014 (6) SA 360 (SCA).

[33] Id at para 15.

[34] Id at para 29.

[35] Id at paras 45-6.

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

without proceeding to trial.[37] The High Court in respect to both actions had raised concerns over the settlements reached. In its judgment, the Supreme Court of Appeal reiterated the principles outlined in *Eke* and confirmed that a compromise extinguishes disputed rights and obligations, puts an end to litigation, and has the effect of *res judicata*.[38] The Supreme Court of Appeal further held that—

> "when the parties to litigation confirm that they have reached a compromise, a court has no power or jurisdiction to embark upon an enquiry as to whether the compromise was justified on the merits of the matter or was validly concluded. When a court is asked to make a settlement agreement an order of court, it has the power to do so. The exercise of this power essentially requires a determination of whether it would be appropriate to incorporate the terms of the compromise into an order of court."[39]

[43] The Supreme Court of Appeal went on to consider the earlier decision of that Court in *Maswanganyi*,[40] where the applicant had reached a settlement agreement with the RAF and 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.[41] On appeal, the applicant argued that the trial court's jurisdiction had been terminated when the parties concluded their settlement.[42] The Supreme Court of Appeal in *Maswanganyi* held:

> "When the parties arrive at a settlement, but wish that settlement to receive the imprimatur of 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. The grant of the consent order will resolve the pleaded issues and possibly issues related 'directly or indirectly to an issue or *lis* between the parties'. Contrary to the passages quoted above, the jurisdiction of the court to resolve the pleaded issues does not terminate when the

[37] Id at para 1.

[38] Id at paras 36 and 40-1.

[39] Id at para 51.

[40] *Maswanganyi* above n 4.

[41] Id at para 3.

[42] Id at para 8.

> parties arrive at a settlement of those issues. If it did, the court would have no power to grant an order in terms of the settlement agreement."[43]

[44] According to the Supreme Court of Appeal in *Taylor*, the decision in *Maswanganyi* contradicts the common law principle that a compromise extinguishes disputed issues, thereby putting an end to litigation.[44] Furthermore, in this manner, *Maswanganyi* goes against the import of *Eke* 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'."[45]

[45] In this regard, it must be borne in mind that judicial power, including the power to make settlement orders, derives from the Constitution itself.[46] For these reasons, the Supreme Court of Appeal in *Taylor* held that *Maswanganyi* was wrong and should not be followed. Ultimately, in the absence of developing the common law, the Court was bound by those principles.[47]

[46] I now proceed to consider the circumstances of this case and determine whether the judge was entitled to unilaterally amend the settlement agreement.

Analysis

The High Court disregarded the parties' agreement and made an order that was adverse to them

[47] In an unopposed application, the High Court was presented with a settlement agreement which it was asked to make an order of court. The Court did not divulge to

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[43] Id at para 15.

[44] *Taylor* above n 37 at para 48.

[45] Id.

[46] *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) (*South African Broadcasting Corporation*) at para 88.

[47] *Taylor* above n 37 at para 49.

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. As stated earlier, the judgment was handed down on 15 May 2021. At no stage were the parties afforded an opportunity to address the Court's concerns if they so wished. In fact, they were not aware of any concerns and were surprised by the outcome. This is despite the obligation on courts to hear the parties before making an order that is adverse to them. Therefore, the *audi alteram partem* (hear the other side) principle was not adhered to.[48]

The High Court exceeded the limits of a court's jurisdiction

[48] It is well-established that a compromise, whether embodied in a court order generally brings an end to the dispute between the parties. Once there is a compromise, there is no longer a *lis* (dispute) between the parties. However, this does not mean that a court has no power to raise concerns over settlement agreements. When asked to make a settlement agreement an order of court, *Eke* demands of the courts to ensure that the agreement is competent and proper before it can be given the seal of a court order.[49] As stated above, a settlement agreement will 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] must not be at odds with public policy" and (c) holds some practical and legitimate advantage.[50] The second element – that a settlement agreement must not be objectionable in law or offensive to public policy – is relevant to this case.

[49] The precepts on public policy are set out in *Barkhuizen*. At its core, public policy represents the legal convictions and values of society. In South Africa, public policy is

[48] *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*) at paras 178-9.

[49] *Eke* above n 10 at para 25.

[50] Id at paras 25-6.

deeply rooted in the Constitution and its underlying values.[51] Where a contractual term conflicts with a constitutional value, it will be contrary to public policy and unenforceable.[52] In deciding whether public policy tolerates time limitation clauses in contracts between private parties, Ngcobo J explained:

> "On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. . . . The other consideration is that all persons have a right to seek judicial redress."[53]

[50] As a general rule, a Judge 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* 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 the 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. 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. However, since the settlement agreement purports to be a settlement of an existing *lis*, a court is entitled to look at the pleadings. A Judge may, for example, find the terms of a settlement agreement incompetent in law such as to raise an exceptional circumstance sufficient for a Judge to alert the parties to her concerns. Furthermore, if, for example, a settlement agreement includes heads of damages which are not the subject of a claim in the particulars of claim, this could be questioned. The same would be true if the settlement involves the payment of an amount exceeding the pleaded claim because then it would not seem to be a settlement.

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[51] *Barkhuizen* above n 20 at para 28.

[52] Id at paras 29-30.

[53] Id at para 57.

Nonetheless, even in these circumstances, courts do not have free reign and must exercise restraint to ensure that there is no undue imposition on contractual freedom. Where a Judge raises concerns, the grounds thereof should be clear and may not be based on information retrieved from inadmissible evidence. Two possibilities then arise.

[51] First, the Judge may refuse to make the settlement agreement, an order of court. Second, the Judge may notify the parties of her concerns. It must be emphasised that the Judge is not entitled to demand the parties to address these concerns. Once the Judge has informed parties of her concerns, the parties may elect not to address the concerns and indicate to the Judge that they regard the matter as settled between them. In such a case, the Judge will note on the court file that the matter has been settled between the parties and that the settlement agreement will not be an order of court. If the parties elect to address the issues raised and the Judge is satisfied, the settlement agreement will be made an order of court. If the Judge is not satisfied, she will refuse to do so. However, the fact that the Judge refused to make the settlement agreement an order of court does not mean that the settlement agreement is invalid. Whether the settlement agreement is valid depends on its terms and the law.

[52] In all these possibilities, the Judge may advise the parties on how they may address the concerns raised. The parties are at liberty to take the advice and amend the settlement agreement accordingly or reject the Judge's advice. Similarly, the matter may proceed to a hearing or trial depending on how the parties elect to deal with the concerns raised. In essence, therefore, a Judge is entitled to raise concerns – what the parties do afterwards is not determined by the Judge but by the parties. If a Judge has concerns arising from the pleadings before it, these have to be raised with the legal representative so that the parties may decide whether they wish to persuade the Judge in which case they may address the concerns or elect not to do so. Judges are neither obliged nor entitled to assess the propriety of a settlement agreement with reference to inadmissible evidential material.

[53] 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, whether they wished to address the issues raised or not. However, the caveat here is that there would have had to be 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. It 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. In doing so, it ignored the warnings of the Supreme Court of Appeal set out in *Motswai*.[54] In the present matter, there was no live dispute between the parties. They had settled their litigious dispute, thereby terminating the court's authority or jurisdiction to pronounce on it. As the validity and terms of the compromise were not in dispute, it was not open to the court to pronounce on it either.

Conclusion

[54] In light of the above, the High Court exceeded its jurisdiction when it unilaterally amended the settlement agreement. Its unilateral alterations to the agreement were improper. As there was no hearing since the parties had settled the dispute between them, it was improper and irregular for the High Court to have considered the actuarial and industrial psychologist's reports to reject the agreed settlement for loss of earnings, as those reports were not properly before the Court. It 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. Had it done so, the parties could have elected to address the Court's concerns or declined to do so. In the latter case, the Court would have been entitled to refuse to make the settlement an order of court on any of the grounds provided for in *Eke* if this were justified. In the result, the appeal must be upheld and the order of the High Court set aside.

[54] *Motswai* above n 33 at paras 45-6.

Remedy

[55] As there is no evidence of impropriety in relation to the settlement agreement, there is no basis for a remittal. Furthermore, there is nothing that caused the Judge to refuse to make the settlement agreement an order of court, apart from the actuarial and industrial psychologist reports (which are not evidence). The order of the High Court must be replaced with one making the original settlement agreement agreed to by the parties an order of court. That agreement which was presented to Daniso J is attached to this judgment and marked "X". As to costs, the RAF was not responsible for the impermissible alteration which the High Court made to the draft order. The RAF did not oppose the application for leave to appeal. There should thus be no order for costs beyond those already provided for in the draft order.

Order

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

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and is replaced with the following: "The draft order marked "X" is made an order of court."
4. There is no order as to costs.

For the Applicants:	BP Geach SC, NJ Potgieter, FHH Kehrhahn, L Mastoroudes and P Grimbeek instructed by VLZR Incorporated
For the Amicus Curiae:	AP Joubert SC, NJ Horn and M Madi instructed by De Broglio Attorneys Incorporated
For the Court appointed counsel:	N Snellenburg SC, MS Mazibuko and TM Ngubeni

"X"

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Roll # x

Case number: 3064/2018

Bloemfontein on this 12th day of May 2021
Before the Honourable Justice Daniso

In the matter between:

TUMELO MAFISA Plaintiff

and

ROAD ACCIDENT FUND Defendant

CLAIM NO: 560/12385488/1034/2
LINK NO: 428491

DRAFT ORDER

BY AGREEMENT BETWEEN THE PARTIES AND AFTER HAVING READ AND CONSIDERED THE PAPERS, IT IS ORDERED THAT:

1.

1.1. The Defendant is liable to pay 100% costs (ONE HUNDRED PERCENT) of the proven and agreed damages;

1.2. The Defendant shall pay the Plaintiff the sum of **R1 652 715.70 (ONE MILLION SIX HUNDRED AND FIFTY-TWO THOUSAND SEVEN HUNDRED AND FIFTEEN RAND AND SEVENTY CENTS)**.

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 **R 1 652 715.70 (ONE MILLION SIX HUNDRED AND FIFTY-TWO THOUSANT SEVEN HUNDRED AND FIFTEEN RAND AND SEVENTY CENTS)** into the Plaintiff's attorney's trust account.

The Plaintiff's Attorney's trust account details are as follows:

ACCOUNT HOLDER:	**VZLR INC**
BRANCH	**ABSA BUSINESS BANK HILLCREST**
BRANCH CODE:	**632005**
TYPE OF ACCOUNT:	**TRUST ACCOUNT**
ACCOUNT NUMBER:	**3014-7774**

1.4. In the event of default on the above payment, interest shall accrue on such outstanding amount at 7% (at the mora rate of 3.5% above the repo rate on the date of this order, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, until the date of payment;

1.5. The defendant is to request and load payment within 14 (fourteen) calendar days from date of this order, with proof of same to be sent to the Plaintiff's attorneys within 5 (five) calendar days of doing same.

2.

2.1. The Defendant shall furnish the Plaintiff with an Undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of medical and non-medical nature to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on **31 January 2016.**

2.2. If the Defendant fails to furnish the undertaking to the Plaintiff within 30 (thirty) days of this order, the Defendant shall be held liable for the payment of the taxable party and party additional costs incurred in the Undertaking.

3.

The Defendant to pay the Plaintiff's taxed or agreed party and party costs on the High Court scale up to and including the trial dates of 11 and 12 May 2021 and the date when this order is made an order of court, for the instructing and correspondent attorneys, which costs shall include, but not be limited to the following:

3.1. All reserved costs to be unreserved;

3.2. The fees of Senior-Junior Counsel, including but not limited to the perusal, consultations, preparation for trial; preparation, consideration, formulation and drafting and completion of the "Heads of Argument" and/or "Submission for Settlement document" accompanying this order; costs and day fees in respect of the trial dates of 11 and 12 May 2021 of Senior-Junior Counsel;

3.3. The costs of obtaining all expert medico legal- and any other reports of an expert nature which were furnished to the Defendant and/or its experts;

3.4. The costs of obtaining documentation / evidence, scans, considered by the expert(s) to finalise their reports;

3.5. The reasonable taxable qualifying, preparation fees of all experts whose report(s) were provided to the Defendant and / or its experts;

3.6. The reasonable costs of consultation fees between the Plaintiff's experts and the Plaintiff's legal teams regarding the matter;

3.7. The reasonable cost of one consultation between the Plaintiff and the Plaintiff's legal team to consider the offer to settle;

3.8. The reasonable taxable reservation fees, as per the attached affidavit, of the following experts:

–	Dr LF Oelofse	Orthopaedic Surgeon
–	Hanri Meyer	Occupational Therapist (Rita van Biljon Occupational Therapists)

– Ben Moodie Industrial Psychologist
– Johan Sauer Actuary

3.9. The reasonable traveling and accommodation cost, incurred in transporting the Plaintiff to all medico-legal appointments;

3.10. The reasonable cost for an interpreter's attendance at the medico legal appointments for translation of information;

3.11. The above-mentioned payment with regard to costs shall be subject to the following conditions:

3.11.1. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

3.11.2. The Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed costs;

3.11.3. The Defendant is to request and load payment within 14 (fourteen) calendar days from date of settlement / taxation of the bill of cost, with proof of same to be sent to the Plaintiff's attorneys within 5 (five) calendar days of doing same;

3.11.4. In the event of default on the above payment, interest shall accrue on such outstanding amount at the mora rate of 3.5% above the repo rate on the date of taxation / settlement of the bill of cost, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

By Order of the Court:

REGISTRAR

For the Plaintiff: VZLR Inc c/o Du Plooy Attorneys – 012 435 9444
Adv NJ Potgieter – 083 226 5198
VZLR reference: PM GRIMBEEK/MAT112740

For the Defendant:	Maite E. Makola (RAF Claims Handler Menlyn) 012 429 5745
RAF Claim reference:	560/12385468/1034/2
Link:	4284914