THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 889/2022

In the matter between:

THOBILE MUCAVELE OBO M MUCAVELE **FIRST APPELLANT**

VZLR INC **SECOND APPELLANT**

and

THE MEC FOR HEALTH, MPUMALANGA PROVINCE **RESPONDENT**

Neutral citation: *Mucavele and Another v MEC for Health, Mpumalanga Province* (889/2022) [2023] ZASCA 129 (11 October 2023)

Coram: PONNAN, SALDULKER, ZONDI and CARELSE JJA and SIWENDU AJA

Heard: 25 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11:00 am on 11 October 2023.

Summary: Unopposed application ─ court impermissibly declining to make consent order an order of court ─ amending terms of settlement agreement ─ granting orders not sought against a non-party.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Legodi JP sitting as court of first instance):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

'The parties have entered into a settlement agreement and agreed that:

(a) The defendant is ordered to pay to the plaintiff the capital amount of R7 184 950, 00 together with interest at the rate determined by the Prescribed Rate of Interest Act No 55 of 1975 calculated from 31 calendar day after the date of this order to date of payment.

(b) Pursuant to the settlement agreement concluded between the parties the defendant is ordered to pay:

(i) The plaintiff's taxed or agreed costs including the costs consequent upon the employment of two counsel

(ii) The costs of the experts who provided and filed reports under Uniform Rules 36(9)(*a*) and 36(9)(*b*);

(iii) The plaintiff's costs relating to the Schedule of Loss dated 11 October 2021

(c) The plaintiff's attorney, VZLR Incorporated, shall cause a trust to be established within three months of the date of this order in accordance with the provisions of the Trust Property Control Act No 57 of 1998 on behalf of the minor child, M M into which the amount contemplated in paragraph (a) hereof shall be paid.'

JUDGMENT

Siwendu AJA (Ponnan, Saldulker, Zondi and Carelse JJA concurring):

[1] This appeal is against the judgment and order of the High Court, Mpumalanga Division, Legodi JP (the high court), granted on 17 March 2021. Ms Mucavele (the first appellant) and her attorneys (VZLR Incorporated), jointly appeal (the appellants) to this Court. Since VZLR Incorporated was the attorney representing the first appellant in the proceedings leading to the orders on appeal, it was not a party to those proceedings. VZLR Incorporated obtained leave to intervene from the high court in the course of the application for leave to appeal to it. The high court had granted orders against VZLR Incorporated even though it was not a party to the proceedings. The Member of the Executive Committee for Health, Mpumalanga Province (the MEC), was the defendant in the action before the high court. Although the MEC is cited as the respondent in the appeal, she does not oppose and abides the decision of this Court. The appeal is with the leave of this Court.

[2] The background to the appeal is uncontested and can be briefly summarised. The first appellant is considered ‘an indigent person.’ On 16 September 2016, she approached Mr Joubert, a director at VZLR Incorporated, to institute a claim against the MEC in a representative capacity as the mother of her minor child. The minor child was diagnosed with spastic quadriplegic cerebral palsy, attributed to a hypoxic ischaemic encephalopathy state, detected at the time of delivery at Tonga Hospital on 17 February 2011.

[3] The proceedings commenced on 17 November 2016. VZLR Incorporated instructed approximately 24 experts to investigate the cause of the spastic

quadriplegic cerebral palsy, and whether the MEC was negligent and could be held liable. In August 2020, the first appellant and the MEC (the parties) settled the question of liability on a '50:50% discounting of liability basis'.

[4] The quantum of damages stood over for determination at a later stage, and was finally enrolled for trial on 22 November 2021. On 10 November 2021, the MEC made an offer in settlement of the dispute. The first appellant accepted the offer in the amount of R 7 184 950. 00, which was to be placed in a trust to be created for the benefit of the minor child. The parties wished to make the settlement agreement an order of court and Mr Joubert incorporated its terms in a draft court order approved by the MEC on 11 November 2021.

[5] It is not necessary to burden the judgment with the terms of the draft court order. They reflect the typical terms in such matters, relating to the quantum agreed, the payment date, and interest accruing in the event of a default as well as the payment of legal and expert costs and the taxing of these costs by the Taxing Master.

[6] Although the issues for determination in the appeal fall within a narrow compass, it is necessary to say something about the proceedings before the high court. The high court practice directives prohibit litigants from settling their dispute on the day of the trial or hearing date. Where parties desire a court order, it must be motivated by an affidavit and placed on the settlement roll on two days' notice. Settlement agreements, together with a notice of removal, must be filed with the registrar at least seven clear court days before the allocated trial date, failing which, their legal representative is called to appear before the court to explain the non-compliance. Clause 15.6 of the practice directive states that:

'It is not in each and every matter which is settled except divorce matters, that there will be a need to make the settlement agreement or draft thereof an order of court unless the motivation is to escalate legal costs or to clock [clog] the court roll unnecessarily.'

[7] Matters in which the parties have entered into a contingency fee agreement regulated by the Contingency Fees Act 66 of 1997 (CFA) are allocated to a separate stream. Mr Joubert instructed his local correspondent, Mr Louw, to file the affidavit required and to place the matter on the settlement roll. That affidavit, dated 16 November 2021 states that:

'I therefore confirm that neither the Plaintiff [nor] the Plaintiff's Legal representative entered into a contingency fee agreement, as contemplated in terms of s 4(1) of the Contingency Fee Act No. 66 of 1997, with one another.'

Although the parties agreed to the settlement on 11 November 2021, Mr Joubert omitted to file the Rule 34(6) Notice but did so on 15 November 2021. The draft court order, accompanied by the affidavit from Mr Louw, was laid before the high court on 20 January 2022, so that an order of court could issue.

[8] The high court was dissatisfied with the characterisation of the fee arrangement between the appellants and raised 'a number of issues of great concern on which more clarity is required . . .', calling on Mr Joubert to file an affidavit to explain whether an illegal contingency fee arrangement had been concluded. It questioned the merits and basis of the settlement, the qualifying and reservation fees due to the 24 experts employed, and required information why 'there should not be certainty about who is entitled to such fees'. The high court informed Mr Joubert that: 'In this division, we do not accept *'if any'* draft orders as this poses a serious problem to the Taxing Master.' The notice concluded that:

'6. As regards paragraph 5 of the draft order, it is hereby suggested that "the nett proceeds . . ." should be specified or clarified.

7. It is hereby suggested that paragraph 7.1 of the draft order should start with "shall and are hereby authorised . . ."
8. Lastly, in addition to the affidavits to be filled, the parties are at liberty to submit written heads of argument by the said date of the submission of affidavits as set out above.'

[9] In answer, Mr Joubert denied that a contingency fee agreement was concluded but accepted that the matter should have been placed on the non-contingency stream. He submitted that there was no need for the supervision required by s 4 of the CFA. As between Mr Joubert and the first appellant, they had agreed that he would recover his reasonable attorney and client fees (agreed to or taxed by the Taxing Master) as well as disbursements not recovered in accordance with the party and party bill of costs on finalisation of the matter. Further confirmatory affidavits from the first appellant and Mr Raath, who represented the respondent, were filed to support the account by Mr Joubert. The high court was not persuaded.

[10] On 27 January 2022, it called on both parties (the first appellant and the MEC) to file heads of argument to address the issue whether in fact a contingency fee agreement was concluded, and to indicate why the settlement was laid before it, if it was indeed not a contingency fee agreement as claimed. The high court then directed its inquiry to 'The MEC for Health in person and as the defendant', stating that:

'3. The contents of paragraphs 18.1 to 18.7 of Mr Joubert's affidavit are also noted and [it] is hereby directed as follows:
3.1 The MEC for Health in person and as a defendant is hereby directed to file an affidavit to deal with the correctness or otherwise of what is averred in paragraphs 18.1 to 18.7 of Mr Joubert's affidavit and whether as the defendant, she or he was prepared to settle on the basis articulated in Mr Joubert's affidavit or that of her attorney filed in this regard despite the fact that the defendant's experts suggested other scenarios. The affidavit to be filed by not later than 12h00 on Wednesday 2 February 2022.

3.2 The parties are further directed to file written heads of argument dealing with the questions whether this court can make an order as suggested without contributory negligence or discounting of liability having been pleaded regard being had also to the affidavit of Mr Louw deposed to on 16 November 2021 in which he or she mentioned that over R14 million was halved based on contributory negligence or discounting. The case law on the point should also be provided.

. . .

6. As regards to the averments made with reference to the reservation, preparation, consultation and qualifying fees, it is hereby directed that the experts, in particular those who assert that they had been reserved, consulted with for the purpose of trial, prepared for trial or are entitled to qualifying fees, should so file affidavits by not later than 12h00 Wednesday 2 February 2022 confirming same and the particulars thereof should be provided regard being had to the fact that the matter was settled in its entirely and removed from the roll on 11 November 2022.

7. This directive and the one issued on 20 January 2022 should be provided to the MEC for the purpose of preparing for her or his affidavit as set out above and this should be provided to the MEC by the defendant's attorneys.'

[11] The MEC filed the affidavit as directed, confirming her role as a nominal defendant in the case, clarifying that she 'is not party to the action in person'. She stated further that:

'9. After the HOD's approval, I was also informed of the settlement and I agree therewith.

10. I am also advised that the Department's documentation relating to the action and settlement are privileged and, in consequence, they are not attached hereto. The defendant, however, consents to the presiding judge be given access to these documents, for a judicial peek, if so required. Such access is granted so that the presiding judge may confirm the existence of the advice that led to the settlement being reached, that the settlement was reached in accordance with the legal advice received and that the Department's best interests were served in reaching the settlement.

11. All the Department's documents relating to this action are made available for a judicial peek without waving the legal professional privilege. . . .

. . .

13. I know of no reason why the action should not have been settled as agreed between the parties. To answer the question posed in "B" hereto, as nominal defendant I was *"prepared to settle on the basis articulated in Mr Joubert's affidavit"*.
14. If any further information is required by the presiding judge, I will assist as best as I can.'

[12] What emerges from the high court's judgment is the finding that there was an illegal contingency fee arrangement between the first appellant and VZLR Incorporated. Further that VZLR Incorporated did not follow the procedure prescribed by the practice directives. The high court substituted the draft order presented to it by: (a) directing that the payment of the capital of the settlement be made to a firm of attorneys to be identified by the Legal Practice Council (the LPC), thus unknown to the first appellant and not of her choice; and ordering that (b) all the legal representatives, Mr Joubert and VZLR Incorporated, be referred to the LPC for investigation. The consequence of the order is that the trust contemplated in the settlement agreement could not be set up and the payment of the benefit to the minor child could not be made pending the resolution of the appeal, leaving the first appellant and her minor child in desperate straits.

[13] In this appeal, the first appellant and VZLR Incorporated dispute the classification of the fee arrangement by the high court. They further contend that, even on the high court's classification, the entire settlement agreement is not invalidated and rendered unenforceable. Further, the high court did not have the power to alter the terms of the settlement agreement, and make orders not sought by the parties. They complain that what the high court did constituted 'judicial overreach' and they accordingly seek the setting aside of the order of the high court and for the consent order to be made an order of court.

[14] It is not strictly necessary to enter into any of these issues. As recently stated by this Court in the *Road Accident Fund v Taylor and other matters* (*Taylor*),[1] a settlement agreement disposes of, and has the effect of bringing an end to the *lis*.

[15] A distinct feature of this appeal is that, despite its earlier misgivings, the high court ultimately had no difficulty with the fact that the merits had been settled or the quantum agreed upon. In *Fischer and Another v Ramahlele and Others* (*Fischer*),[2] this Court cautioned that it was for the parties to 'define the nature of their dispute and it is for the court to adjudicate upon those issues.'[3]

[16] *Fischer*, emphasised that a court may *mero motu* raise a question of law if it emerges fully from the evidence and is necessary for a decision in the case. The legality of the contingency fee arrangement was not such a question. Most recently, in the *Road Accident Fund v MKM obo KM and Another*; *Road Accident Fund v NM obo CM and Another*,[4] this Court clarified that a contingency fee agreement 'is a bilateral agreement between the legal practitioner and his or her client. It has nothing to do with a party against whom the client has a claim'. Furthermore, an invalid or unlawful contingency fee agreement would not necessarily invalidate the underlying settlement agreement. The high court failed to consider whether the validity of the contingency fee agreement was severable from the rest of the settlement agreement.

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[1] *Road Accident Fund v Taylor and other matters* [2023] ZASCA 64; 2023 (5) SA 147 (SCA) para 39.
[2] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA).
[3] Ibid para 13.
[4] *Road Accident Fund v MKM obo KM and Another*; *Road Accident Fund v NM obo CM and Another* [2023] ZASCA 50; [2023] 2 All SA 613 (SCA); 2023 (4) SA 516 (SCA) paras 27 and 37; and 40 to 42.

[17] Significantly, the orders were made against VZLR Incorporated at a stage when it was not a party to the litigation. For this and the reasons stated above, the orders by the high court rightly fall to be set aside.

[18] What remains for decision is the costs of the appeal. Despite filing a notice to abide, a sizeable legal team of two counsel, an attorney and two candidate attorneys attended the hearing to represent the MEC. This Court was concerned that costs and disbursements would be unnecessarily incurred, straining already stretched State resources, in circumstances where a local correspondent could have attended the proceedings on a watching brief. When questioned, counsel for the MEC submitted that given the approach taken by the high court, which called on the MEC to address questions about the settlement reached, they attended the hearing 'to gain full knowledge of the proceedings and to assist the court should questions concerning the respondent arise'.

[19] The respondent was called upon by this Court to indicate why it was necessary to instruct a considerable team to appear, and who should bear the legal costs and disbursements connected therewith. The MEC has filed an affidavit. It largely confirms the submissions and the well-made concessions by counsel. It leaves the issue to the discretion of the Court. From the submissions at the bar and the affidavit filed, there is an acceptance that counsel and the attorneys will not mark any fees for their attendance, which they accept was unnecessary.

[20] In the result, I make the following order:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

'The parties have entered into a settlement agreement and agreed that:

(a) The defendant is ordered to pay to the plaintiff the capital amount of R7 184 950, 00 together with interest at the rate determined by the Prescribed Rate of Interest Act No 55 of 1975 calculated from 31 calendar day after the date of this order to date of payment.

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(iii) The plaintiff's costs relating to the Schedule of Loss dated 11 October 2021

(c) The plaintiff's attorney, VZLR Incorporated, shall cause a trust to be established within three months of the date of this order in accordance with the provisions of the Trust Property Control Act No 57 of 1998 on behalf of the minor child, M M into which the amount contemplated in paragraph (a) hereof shall be paid.'

N T Y SIWENDU

ACTING JUDGE OF APPEAL

Appearances

For appellants:	PF Louw SC
Instructed by:	VZLR Inc, Pretoria
	Honey Attorneys, Bloemfontein
For respondent:	K Lefaladi with M Mathapuna
Instructed by:	Ndobela and Associates Inc, Mbombela
	Bokwa Law Inc, Bloemfontein.