THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1136/2021
1137/2021
1138/2021
1139/2021
1140/2021

In the matters of:

THE ROAD ACCIDENT FUND	**Appellant in SCA Case No. 1139/2021**
MARILYN DORIS TAYLOR	**First Appellant in SCA Case No. 1140/2021**
HLENGANI VICTOR MATHONSI	**Second Appellant in SCA Case No. 1140/2021**
DE BROGLIO ATTORNEYS INC.	**First Appellant in SCA Case No. 1136/2021**
ZANDELEE DE SWARDT	**Second Appellant in SCA Case No. 1136/2021**
IVAN BARRY KRAMER	**Appellant in SCA Case No. 1138/2021**
MICHAEL VAN DEN BARSELAAR	**Appellant in SCA Case No. 1137/2021**

In re GJ Case No. 37986/2018:

MARILYN DORIS TAYLOR **Plaintiff in the Court a quo**

and

THE ROAD ACCIDENT FUND **Defendant**

And in re GJ Case No. 13753/2019:

HLENGANI VICTOR MATHONSI **Plaintiff in the Court a quo**

and

THE ROAD ACCIDENT FUND **Defendant**

Neutral citation: *The Road Accident Fund v Taylor and other matters* (1136-1140/2021) [2023] ZASCA 64 (8 May 2023)

Coram: SALDULKER, VAN DER MERWE and MEYER JJA and KATHREE-SETILOANE and OLSEN AJJA

Heard: 20 February 2023

Delivered: 8 May 2023

Summary: Practice and procedure – final settlement of claim against Road Accident Fund – compromise – extinguishes disputed rights and obligations and puts end to litigation – has effect of *res iudicata* – court has no jurisdiction to enquire into whether compromise justified on merits or validly concluded – power of court to make compromise order of court on request.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Fisher J, sitting as court of first instance): Judgment reported *sub nom Taylor v Road Accident Fund* 2021 (2) SA 618 (GJ)

1 The appeals are upheld.

2 Paragraphs 1a to 1c and 1e of the order of the court a quo are set aside and replaced with the following:

'By agreement the matter is removed from the roll'.

3 Paragraphs 2a to 2c and 2e of the order of the court a quo are set aside and replaced with the following:

'By agreement the draft order presented to the court is made an order of court'.

JUDGMENT

Van der Merwe JA (Saldulker and Meyer JJA and Kathree-Setiloane and Olsen AJJA concurring):

[1] This judgment deals with a number of extraordinary appeals. The appeals are against the order of the Gauteng Division of the High Court, Johannesburg (Fisher J) in respect of two actions against the Road Accident Fund (the RAF), after each of the actions had been settled without proceeding to trial. Aspects of the order are appealed by all the parties concerned, as well as by other persons affected by the order. The appeals raise mainly two legal issues. The principal issue concerns the consequences of the settlement of disputed issues in litigation and the powers of a

court in relation thereto. A subsidiary issue relates to the rights of a person who is not a party to legal proceedings, but whose conduct is referred to the statutory body or institution responsible for oversight over the members of the profession that the person belongs to. The appeals came to this court in the manner set out below.

The RAF

[2] The RAF is a juristic person established under s 2 of the Road Accident Fund Act 56 of 1996 (the RAF Act). In terms of s 3 of the RAF Act, the object of the RAF is the payment of compensation for loss or damage wrongfully caused by the driving of motor vehicles. The RAF is publicly funded in accordance with ss 5 and 6 of the RAF Act. Section 10 of the RAF Act provides for a board of the RAF. Its powers and functions, in terms of s 11, are to exercise overall authority and control over the financial position, operation and management of the RAF, subject to the powers of the Minister of Transport. The board is also empowered to appoint a chief executive officer, to whom it may delegate any of its powers or duties.

[3] Section 4(1) of the RAF Act provides:

'The powers and functions of the Fund shall include-

(a) . . .

(b) the investigation and settling, subject to this Act, of claims arising from loss or damage caused by the driving of a motor vehicle whether or not the identity of the owner or the driver thereof, or the identity of both the owner and the driver thereof, has been established;

(c) the management and utilisation of the money of the Fund for purposes connected with or resulting from the exercise of its powers or the performance of its duties; and

(d) . . .'

In terms of s 15(1)*(a)* the RAF may institute and defend legal proceedings. Section 15(1)*(b)* provides that the RAF may 'commence, conduct, defend or abandon legal proceedings in connection with claims investigated and settled by it'.

The Taylor matter

[4] During September 2018, Ms Marilyn Doris Taylor, represented by De Broglio Attorneys Incorporated (De Broglio Inc), instituted an action against the RAF. She alleged that she had sustained injuries in a motor vehicle accident, which entitled her

to compensation under the RAF Act in respect of, *inter alia*, future loss of earnings, pain and suffering, disfigurement, inconvenience and loss of amenities of life (general damages). The RAF entered an appearance to defend the action. In due course, De Broglio Inc therefore delivered various expert reports. These included reports assessing the seriousness of Ms Taylor's injuries prepared by a general practitioner (Dr Kevin Scheepers), as well as the medico-legal reports of an orthopaedic surgeon, occupational therapist and industrial psychologist. It also delivered the report of an actuary, Mr Ivan Kramer. This report typically reflected actuarial calculations of future loss of earnings based on information that had been provided to the actuary.

[5] The matter was enrolled for trial for 12 October 2020. By then negotiations for a settlement had commenced. De Broglio Inc assigned a candidate attorney in its employ, Ms Zandelee de Swardt, to deal with the matter and briefed counsel, Mr Michael van den Barselaar, to represent Ms Taylor at the trial. On 13 October 2020, the matter was allocated to Fisher J. Subsequently, however, Ms Taylor accepted an offer by the RAF in full and final settlement of her claims. The settlement *inter alia* provided that the RAF would pay compensation to Ms Taylor in the amount of R1.3 million.

[6] In the light hereof, the parties approached Fisher J on 14 October 2020, for an order removing the matter from the roll. At the insistence of Fisher J, the senior claims manager of the RAF, who had approved the settlement, attended the hearing. In answer to questions by Fisher J, he told the court that he was an admitted attorney with 19 years' experience in the field and explained how the settlement came about. Despite a valiant effort by Mr Van den Barselaar to obtain the order that both parties sought, the court was unmoved. It appeared that this stance was motivated by concerns about the propriety of the settlement amount of R1.3 million.

[7] Ultimately Fisher J postponed the matter to 3 November 2020 and directed that argument be presented on that day on four questions, formulated as follows:

'(a) Is there a settlement in this case of the claim on behalf of the Plaintiff?

(b) Is the RAF entitled to settle a matter with a plaintiff without judicial approval of a settlement?

(c) If the answer to (b) is yes then are there any limitations or requirements in relation to such settlement?

(d) Is the fact that the matter is on the roll before a judge an indicator that the Court may exercise judicial oversight to determine if a settlement is proper?'

The Mathonsi matter

[8] Mr Hlengani Victor Mathonsi also sustained injuries caused by the driving of a motor vehicle. He accordingly issued summons against the RAF for payment of compensation in respect of, *inter alia*, future loss of earnings and general damages. Mr Mathonsi was also represented by De Broglio Inc. The RAF defended the action. De Broglio Inc proceeded to deliver serious injury assessment reports prepared by Dr Scheepers, as well as the medico-legal reports of an orthopaedic surgeon, occupational therapist and industrial psychologist. It also delivered an actuarial report prepared by Mr Kramer, similar to the one in the Taylor matter.

[9] The matter was set down for trial on 14 October 2020. On 15 October 2020, it was also allocated to Fisher J. By that time, however, the matter had become settled. The parties prepared a draft order that reflected the settlement of the action. It, *inter alia*, provided for payment of compensation in the amount of R1 775 360.35 to Mr Mathonsi. The parties agreed that the court be requested to make the draft order an order of court. When the matter was called before Fisher J on 15 October 2020, counsel for Mr Mathonsi (Mr Motala) asked for such an order.

[10] The court did not, however, address the request of the parties. Instead, it raised certain procedural issues. These were: why the discovery affidavit had not been 'commissioned'; whether the particulars of claim had been properly amended; and why the affidavit of a general practitioner had been signed but not 'commissioned'. Fisher J postponed this matter to 3 November 2020 as well, for argument on these procedural issues.

Hearing and judgment

[11] At the hearing of the Taylor matter on 3 November 2020, senior counsel for Ms Taylor and the RAF respectively, were in agreement on all four of the questions that had been referred for argument. They agreed that:

(a) There had been a settlement of the Taylor matter and there was no longer a *lis* between the parties;

(b) The RAF was entitled to settle with a plaintiff without judicial approval of such settlement;

(c) There were no statutory limitations or requirements in relation to the settlement of a claim by the RAF; and

(d) It was irrelevant whether a matter had been on the roll before a particular judge when it became settled.

In the result, both parties asked for an order removing the matter from the roll. However, Fisher J had 'secured the appointment of an *amicus curiae*' (Ms Hassim SC), who put forward opposing contentions.

[12] After the hearing of the Taylor matter on 3 November 2020, the court reserved judgment and the Mathonsi matter was called. Only Mr Matolo appeared in the Mathonsi matter. He addressed the aforesaid procedural issues and moved for the draft order to be made an order of court. He was not called upon to address any other issue. The court reserved judgment in this matter as well.

[13] On 16 November 2020, Fisher J handed down a single judgment dealing with both the Taylor and Mathonsi matters. The wide-ranging judgment paid scant attention to the questions that had been referred to argument in the Taylor matter and did not mention those in the Mathonsi matter. Instead, it addressed two broad themes.

[14] The first concerned the viability of the RAF as such. The court held that: the RAF was unable to pay its debts when they fell due and was thus bankrupt; the present system was 'unworkable, unsustainable and corrupt'; and a viable alternative had to be found if the RAF was to perform its statutory function. This led Fisher J to offer the following advice:

‘In my view, the fund should be liquidated and/or placed under administration as a matter of urgency. This is the only way that this haemorrhage of billions of rands in public funds can be stemmed and proper and valid settlement of the plaintiff’s claims be undertaken in the public interest. I have asked that this judgment be brought to the attention to the Minister of Transport, the Acting Chief Executive Officer of the Road Accident Fund, and the National Director of Public Prosecutions.’

[15] The second, more pertinent, theme was that the Taylor and Mathonsi matters were but instances of widespread exploitation of the RAF. In this regard the court concluded:

‘From these two cases, and others which I have heard, a modus operandi emerges as follows:

- A relatively modest claim is brought and the Case Management Court process is undertaken on these pleadings.
- In the actuarial calculation, the income of the plaintiff pre-accident is inflated and/or the aspirations of the plaintiff are exaggerated or even fabricated in order to suggest a career progression when there is none.
- These fallacious assumptions are used by the actuary to calculate a loss of earning capacity which yield significantly inflated figures because of the exponential nature of the calculation.
- This actuarial report is then used as a basis for an amendment of the claim without any oversight.
- The RAF is not represented and is overwhelmed by the sheer volume of cases and/or the officials are pliable. They thus place undue reliance on the representations of the plaintiff’s attorney as to the loss.
- As to general damages, under-qualified and sometimes pliable doctors are used to suggest the injuries are more serious than they, in fact, are.’

[16] Part of this general *modus operandi*, so the court said, was to avoid judicial scrutiny of the settlement agreements. It stated:

‘What is of most concern, is that these two cases are not isolated instances, but are examples of a general approach which most courts are met with daily in their attempts at fostering and maintaining judicial oversight in the RAF environment. These cases expose defiant attempts by legal representatives to avoid judicial scrutiny of settlements entered into

with the RAF under circumstances which are strongly suggestive of dishonesty and/or gross incompetence on the part of those involved.'

[17] The court said that De Broglio Inc did not stand alone in its approach consisting of 'tactics' that had to be contrasted with behaving 'in a manner which embraces openness and honesty'. It also said:

'Whilst De Broglio might believe that it has served the interests of its clients and itself in achieving a settlement agreement for a grossly inflated amount in circumstances where it has avoided this Court's jurisdiction, in fact it has placed them in jeopardy.'

In relation to the Mathonsi matter, the court said that the reports of Dr Scheepers and Mr Kramer had been 'employed to dubious end' and that its general sense was that the matter had been dealt with in a 'dishonest and cavalier manner'. In their context these remarks could only relate to De Broglio Inc.

[18] With regard to the conduct of the legal representatives of Ms Taylor, the court stated that the proposal that had been made to the RAF, 'constituted, on the face of it, a deliberate misrepresentation of the claim and the evidence available to prove it'. It held:

'There can, in my view, be no doubt that Mr van den Barselaar and Ms de Swardt were both well aware of the force of the contents of the Proposal in the context of the settlement engagement and the representations made therein.'

It proceeded to say:

'To my mind the approach adopted by the plaintiff's legal representatives is nothing more than sleight of hand. There is no evidence that Ms Taylor lost her job as a result of the accident; the use of Mr Kramer's actuarial calculation as a basis of the amended claim bears no scrutiny; and Ms Taylor does not qualify for general damages on her own case. And yet, through the machinations of Ms de Swardt of De Broglio and Mr van den Barselaar an offer of R1 300 000 was extracted from the RAF.'

[19] Fisher J thus held that De Broglio Inc, Ms De Swardt and Mr Van den Barselaar had: dishonestly misrepresented the facts of the Taylor matter to the RAF; thus extracted a grossly inflated settlement offer from the RAF; and sought to avoid judicial scrutiny of the consequent settlement agreement.

[20] Even the actuary, Mr Kramer, was not spared. Fisher J said that Mr Kramer's calculations in the Taylor matter had been made on the basis of a 'patently false' assumption as to Ms Taylor's income. The implication of the judgment was that this was deliberate. This is evidenced by the court's reference to 'Mr Kramer's contrived report'.

[21] Under the heading 'The effect of the purported settlements', the court said:

'The commencement, defence and conduct of litigation by organs of state constitutes the exercise of public power. It must be done in a constitutionally compliant manner upholding legality and the rule of law. The RAF has chosen to ignore this Court's pointed concerns and instead of insisting on an order of Court as a precondition to its settlement, which would be the rational approach it has chosen to acquiesce in the tactic adopted by De Broglio on behalf of the plaintiff. That the RAF is conducting its business in this reckless manner under insolvent circumstances is of great concern to this Court.

What is clear in relation to these two cases is that the RAF officials did not act lawfully to conclude the settlements and for this reason they are void *ab initio*. Thus on this issue, I agree with Ms Hassim that there is no settlement.'

[22] The judgment nevertheless concluded as follows:

'To the extent that the settlements are unconstitutional they are unenforceable. And if payment is made pursuant thereto this would constitute irregular expenditure by the RAF and potentially make those approving such payments vulnerable to personal scrutiny by the Courts. The RAF is a public entity, as contemplated in Part A of Schedule 3 of the Public Finance Management (PFMA) and is therefore subject to the onerous prescripts relating to public expenditure set out in the PFMA. Thus, without further collusion by the RAF in relation to payment, the settlements are, in effect, worthless.'

[23] The following order was issued:

'1. In case 37986/2018 Taylor v RAF the following order is made:

a. The matter is postponed sine die.
b. This judgment is to be brought to the attention of any court called upon to enforce the purported settlement agreement.
c. The conduct of De Broglio Inc, Ms de Swardt, and Mr van den Barselaar is referred to the Legal Practice Counsel.

d. The conduct of Dr Kevin Scheepers in this matter is referred to the Health Professions Council of South Africa (HPCSA).
e. The conduct of Mr Ivan Kramer is referred to the Actuarial Society of South Africa.

2. In case 13753/2019 Mathonsi v RAF the following order is made:
a. The matter is postponed sine die.
b. This judgment is to be brought to the attention of any court called upon to enforce the purported settlement agreement.
c. The conduct of De Broglio Inc is referred to the Legal Practice Counsel.
d. The conduct of Dr Kevin Scheepers in this matter is referred to the HPCSA.
e. The conduct of Mr Ivan Kramer is referred to the Actuarial Society of South Africa.

3. A copy of this judgment is to be delivered to:
a. the Minister of Transport;
b. the Acting Chief Executive Officer of the Road Accident Fund; and
c. the National Director of Public Prosecutions.

4. Each party shall pay their own costs.'

Appealability

[24] Ms Taylor applied for leave to appeal against paras 1a and 1b of the order. Mr Mathonsi applied for leave to appeal against paras 2a and 2b of the order. The RAF applied for leave to appeal against all of these paras of the order (collectively the postponements). De Broglio Inc, Ms De Swardt, Mr Van den Barselaar and Mr Kramer (the affected persons) separately applied for leave to intervene and for leave to appeal against the respective paragraphs of the order that affected them (collectively the referrals). (Dr Scheepers did not challenge the orders that affected him).

[25] The court dismissed the applications for leave to appeal of Ms Taylor, Mr Mathonsi and the RAF, on the ground that it had made no appealable order in respect of these parties. The court also dismissed the applications for intervention. On this basis, the applications of the affected persons for leave to appeal, fell away. It is not easy to fathom the reasons for refusing leave to intervene. It would appear, however, that the court reasoned that the affected persons purported to attack findings and not orders and that the referrals were not final orders. Subsequently,

however, this court granted each of the parties and affected persons the leave to appeal to this court that they had sought.

[26] That leave to appeal was granted, is only one of the two requirements for this court to have jurisdiction to entertain an appeal. The other requirement is that the order sought to be appealed against is a 'decision' within the meaning of s 16(1)*(a)* of the Superior Courts Act 10 of 2013. Not only traditional final judgments are such decisions. It has become settled law that an order could qualify as an appealable decision if it has a final and definitive effect on the proceedings or if the interests of justice require it to be regarded as an appealable decision. What the interests of justice require is not determined by a closed list of considerations, but depends on the facts and circumstances of each case. However, whether an appeal would lead to a just and expeditious determination of the essence of the matter, is an important consideration in deciding whether an order should be regarded as an appealable decision. See *DRDGOLD Limited and Another v Nkala and Others* [2023] ZASCA 9 paras 17-27.

[27] For the reasons that follow, I have no doubt that the postponements are appealable decisions. First, one must have regard to three factors:

(a) The finding that the settlement agreements are void *ab initio*;

(b) The finding that, 'without further collusion by the RAF in relation to payment, the settlements are, in effect, worthless'; and

(c) The terms of the postponements, namely that each matter is postponed *sine die* with the directive that the judgment of the court a quo is to be brought to the attention of any court called upon to enforce 'the purported settlement agreement'.

[28] The combined effect of these factors is that the parties are unable to execute the settlement agreements that they firmly regard as binding on them. They cannot move forward or backward in this regard and are stuck in no-man's land, as it were. In substance, the postponements therefore have a final and definitive effect on the respective proceedings. Secondly, successful appeals would bring these matters to finality. Thus it is in any event in the interests of justice to entertain these appeals.

[29] As to the appealability of the referrals, it suffices to say that the facts and circumstances that I shall allude to shortly, indicate that the interests of justice require that they be corrected forthwith and that the affected persons should not be required to await the outcome of the proceedings before the respective professional bodies. See *Beinash v Wixley* 1997 (3) SA 721 SCA at 729H-730E.

Analysis

[30] Before I turn to the legal issues that I have identified at the outset, I am constrained to say the following. Whilst Fisher J's industry cannot be faulted, it regrettably has to be said that not a single finding that she made had been open for her to make. Moreover, these findings were made without any admissible evidence. The findings in respect of the viability of the RAF, were mainly based on an affidavit of the acting chief executive officer of the RAF in another matter and the 2019 annual report of the RAF. The findings in respect of the settlement agreements and the conduct of the affected persons, were based on the unspecified knowledge of the judge of the facts and circumstances of other matters and the pleadings and expert reports in the court files. It is trite that none of this constituted evidence before the court. Therefore it is unnecessary to consider whether the judgment in any event disclosed tenable reasoning in respect of any of these findings. Thus, the judge decided non-issues without evidence, to the detriment of all concerned. This injudicious overreach has to be strongly deprecated.

[31] Where the misappropriation of public funds is properly raised before a court, it must, of course, deal with it decisively and without fear, favour or prejudice. But a court has no general duty or power to exercise oversight over the expenditure of public funds. This is so for three main reasons. The first is the constitutional principle of separation of powers. The second is that the exercise of such a duty or power would infringe the constitutional rights of ordinary citizens to equality and to a fair public hearing. The third is the principle that the law constrains a court to decide only the issues that the parties have raised for decision. See *Magistrates Commission and Others v Lawrence* [2021] ZASCA 165; 2022 (4) SA 107 SCA para 78-79. A perception that a system of state administration is broken, is not a licence to disregard fundamental principles of procedural or substantive law.

The referrals

[32] It is convenient to commence with a consideration of the appeals against the referrals. They were based on the findings of dishonesty and impropriety on the part of the affected persons that I have referred to. The referrals are inextricably linked to these findings. The judgment of the court a quo was forthwith made available electronically and subsequently published in the law reports. In the nature of things, it would have spread like wildfire in the relevant communities. There can be no doubt that the referrals had and continue to have grave reputational and practical consequences for the affected persons.

[33] In the circumstances, the age-old principle of *audi alteram partem* required that the affected persons be afforded reasonable prior notice and opportunity to state their cases. In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association intervening)* 2002 (1) SA 429 (CC) para 11, the following was said with particular reference to s 34 of the Constitution:

'This s 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. . .'

[34] The affected persons were not afforded any such notice or opportunity. It follows that the findings and referrals were made in complete disregard of the rights of the affected persons. The referrals are manifestly unjust, cannot stand and must be set aside at this stage.

The postponements

[35] The settlement agreements in the Taylor and Mathonsi matters are final and unconditional compromises. There is no indication that a contingency fee agreement was involved in these matters. Thus, the general principles relating to a compromise are applicable to them.

[36] The essence of a compromise (*transactio*) is the final settlement of disputed or uncertain rights or obligations by agreement. Save to the extent that the compromise provides otherwise, it extinguishes the disputed rights or obligations. The purpose of a compromise is to prevent or put an end to litigation. Our courts have for more than a century held that, irrespective of whether it is made an order of court, a compromise has the effect of *res iudicata* (a compromise is not itself *res iudicata* (literally 'a matter judged') but has that effect).

[37] Because, as I shall show, the majority in *Maswanganyi v Road Accident Fund* [2019] ZASCA 97; 2019 (5) SA 407 SCA (*Maswanganyi*), did not follow these principles, it is necessary to make rather extensive reference to the judgments which have enunciated these principles. A convenient starting point is *Cachalia v Harberer & Co* 1905 TS 457 (Innes CJ and Solomon and Mason JJ). There a settlement of an action in the magistrate's court was not entered upon the record. The plaintiff's subsequent claim against the defendant on the original contract, was met by the defence that it was precluded by the settlement agreement. The court upheld the defence in these terms:

'Now does it make any difference that no judgment was entered at the time, and that this settlement was merely a settlement between the parties which was not entered in the records of the court? The authorities seem to me clear that this does not make any difference, that a *transactio* may be either a judicial one, which is entered in the records of the court, or may be extra-judicial, but that the effect is the same. A compromise whether embodied in a judgment of the court or extra-judicial has the effect of *res judicata*, and is an absolute defence to an action on the original contract.'

[38] In *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 270, Innes CJ referred to the common law and proceeded to say:

'According to that law a *transactio*, if established and valid, is an absolute defence to the action compromised. It has the effect of *res judicata*.'

The next important case is *Estate Erasmus v Church* 1927 TPD 1. The full bench (at 25-26) extensively referred to common law authorities, had regard to *Cachalia v Harberer* and *Western Assurance* and concluded:

'The object therefore of a compromise is to end, or to destroy, or to prevent a legal dispute. The effect of a compromise is *res judicata*; and, according to *Domat*, the effect is even stronger than that of a judgment inasmuch as, unlike in the case of judgments, the parties have consented to the terms on which they intend to compromise.'

[39] These dicta have repeatedly been approved by this court. See *Van Zyl v Niemann* 1964 (4) SA 661 AD at 669H and, in particular, *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 915 AD at 921A-D and 922C. See also *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* [2017] ZASCA 54; 2017 (5) SA 508 SCA para 14 and *Watson NO v Ngonyama and Another* [2021] ZASCA 74; 2021 (5) SA 559 (SCA) para 60. In *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) para 10, it was stated that our courts encourage parties to deal with their disputes by way of compromise. This court proceeded to say, with reference to *Estate Erasmus v Church*, that when concluded, such a compromise disposes of the proceedings. The culmination of all of this, for purposes of this judgment, as stated in *Legal-Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015 (2) SA 568 SCA para 22, is that once 'the parties have disposed of all disputed issues by agreement *inter se*, it must logically follow that nothing remains for a court to adjudicate upon or determine'.

[40] When requested to do so, a court has the power to make a compromise, or part thereof, an order of court. This power must, of course, be exercised judicially, that is, in terms of a fair procedure and with regard to relevant considerations. The considerations for the determination of whether it would be competent and proper to make a compromise an order of court, are threefold. They are set out in *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 25-26 (*Eke v Parsons*).

[41] The first consideration is whether the compromise relates directly or indirectly to the settled litigation. An agreement that is unrelated to litigation, should not be

made an order of court. The second is whether the terms of the compromise are legally objectionable, that is, whether its terms are illegal or contrary to public policy or inconsistent with the Constitution. Such an agreement should obviously not be made an order of court. The third consideration is whether it would hold some practical or legitimate advantage to give the compromise the status of an order of court. If not, it would make no sense to do so.

[42] The relevant issue in *Eke v Parsons* was whether a settlement agreement that had been made an order of court, was final in its terms and whether the other party was entitled to approach a court for the enforcement of the order in accordance with the procedure set out therein. The Constitutional Court therefore did not consider the nature and effect of a compromise and did not bring about any change to the law in that regard. Importantly, however, the judgment makes clear (paras 8, 19-24 and 27-28) that the power to make a compromise an order of court, is derived from a long-standing practice aimed at assisting the parties to give effect to their compromise. The clear import of *Eke v Parsons* therefore is that this power is not derived from the jurisdiction of the court over the issues that had been raised before it, but were subsequently settled. In making a compromise an order of court, the court plainly does not determine the issues that the compromise settled. Unless a compromise is conditional upon it being made an order of court, the fact that a court declines to do so, in itself, has no effect on the enforceability of the compromise *inter partes*.

[43] This brings me back to *Maswanganyi*. In that matter, the appellant sued the RAF on behalf of her minor child for loss of support. She alleged that the death of the child's father had been caused by the negligence of the driver of a vehicle that collided with the vehicle driven by the deceased. The RAF defended the action and the matter was set down for trial. Prior to the commencement of the trial, the parties settled the action. They accordingly requested the judge to whom the trial had been allocated, to make their settlement agreement an order of court.

[44] The judge refused to do so, on the basis that the pleadings and certain witness statements (which must have been in the court file), did not indicate any negligence on the part of the other driver. The judge required witnesses to testify and

a witness commenced his testimony before the trial was postponed. Prior to the date on which the trial was to resume, the appellant launched an application for, essentially, a declarator that the *lis* between the parties had been fully and finally settled and for an order making the settlement agreement an order of court. The court refused the application. The appellant unsuccessfully appealed to the full court. Her further appeal came to this court with its special leave.

[45] On appeal the minority (Zondi JA, Mocumie JA concurring) would have upheld the appeal and would have granted the relief that the appellant had sought. On the issue that is relevant to this judgment, the minority held that the views of the trial judge as to the merits of the action, were irrelevant and that, on an application of the guidelines in *Eke v Parsons*, the settlement agreement should have been made an order of court.

[46] The majority differed. It stated that there were two issues for decision in the appeal. The first was whether it was procedurally permissible to challenge the court's decision (to refuse to make the settlement agreement an order of court and to direct that the trial proceed) in the aforesaid manner. The second issue, concerning the permissibility of the approach of the trial court to the settlement agreement, so the majority said, would only be reached should the first issue be decided in favour of the appellant. Although it proceeded to decide the first issue against the appellant, it found it necessary to make 'some remarks' about the second issue. The majority expressly recognised, however, that these remarks (paras 25-37) were *obiter*. I therefore need not say anything about them.

[47] Nevertheless, the *rationes decidendi* of the majority in respect of the first issue, included the following *dicta* (paras 15-16):

'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".

. . . the jurisdiction of the court to resolve the pleaded issues does not terminate when the 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.
The correct position is that the grant of an order making a settlement agreement an order of court necessarily involves an exercise of the court's jurisdiction to adjudicate upon the issues in the litigation. Its primary purpose is to make a final judicial determination of the issues litigated between the parties.'

[48] It is apparent that this passage contradicts:

(a) The common law principles that a compromise extinguishes disputed issues and puts an end to litigation;

(b) The decisions of this court that a compromise has the effect of *res iudicata*; and

(c) The import of *Eke v Parsons*, namely that the power to make a compromise an order of court arises from a long-standing practice and not 'from the jurisdiction of the court to resolve the pleaded issues' or 'the court's jurisdiction to adjudicate upon the issues in the litigation'.

[49] The majority had no regard to these common law principles. In the absence of development of the common law, the court was bound to apply them. Unless it determined that they were clearly wrong, the court was bound by the decisions of this court that I have referred to. See *Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd and Another* [2013] ZASCA 15; 2013 (3) SA 611 SCA para 14. The majority also did not consider any of these decisions. Although it referred to *Eke v Parsons*, it failed to have regard to its impact on the issues under consideration. On these issues, I regret to say, the judgment of the majority in *Maswanganyi* is clearly wrong and should not be followed.

[50] The court a quo referred to a practice directive that had been issued on 2 October 2019, which appears to run contrary to this judgment, in that it provides for a judge to 'interrogate' the circumstances under which a settlement agreement was entered into. The meaning of the portion of the practice directive, as quoted in the judgment of the court a quo, is quite unclear. As we have insufficient evidence in respect of its status, scope of application and context, I am loath to express a firm

view on this practice directive. It suffices to say that to the extent that this (or any other) practice directive is in conflict with this judgment, it is invalid. See *Mhlongo and Others v Mokoena NO and Others* [2022] ZASCA 78; 2022 (6) SA 129 (SCA) para 14.

[51] To sum up, 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.

[52] It follows that the court a quo should have removed the Taylor matter from the roll. There was no legitimate reason for refusing to make the draft order in the Mathonsi matter an order of court. The appeals of the RAF, Ms Taylor and Mr Mathonsi must therefore also succeed.

[53] In the result the following order is issued:

1 The appeals are upheld.

2 Paragraphs 1a to 1c and 1e of the order of the court a quo are set aside and replaced with the following:

‘By agreement the matter is removed from the roll’.

3 Paragraphs 2a to 2c and 2e of the order of the court a quo are set aside and replaced with the following:

‘By agreement the draft order presented to the court is made an order of court’.

_____

C H G VAN DER MERWE

JUDGE OF APPEAL

Appearances

For the RAF:	M Antonie SC with M V J Chauke
Instructed by:	Mpoyana Ledwaba Inc Attorneys, Pretoria Modisenyane Attorneys Inc, Bloemfontein
For Ms Taylor & Mr Mathonsi:	A P Joubert SC with J M Killian
Instructed by:	De Broglio Attorneys Inc, Johannesburg Matsepes Inc, Bloemfontein
For De Broglio Inc & Ms de Swardt:	J G Wasserman SC with E F Serfontein
Instructed by:	De Broglio Attorneys Inc, Johannesburg Matsepes Inc, Bloemfontein
For Mr Kramer:	A P Joubert SC with N J Horn
Instructed by:	Bove Attorneys Inc, Johannesburg Lovius Block, Bloemfontein
For Mr Van den Barselaar:	P Stais SC
Instructed by:	RFI Attorneys, Johannesburg Honey Attorneys Inc, Bloemfontein