



## UBISI AND ANOTHER v THE ROAD ACCIDENT FUND (711/2023) [2024] ZACSCA 93

1 August 2024

Post settlement between the parties, can a judge interfere?

In the matter of Ubisi and another v Road Accident Fund, (711/2023) [2024] ZACSCA 93 the Supreme Court of Appeal dealt with the question.

The matter was in the Supreme Court of Appeal on 13 May 2024. The appeal deals with the powers of a court when parties have settled their dispute, without proceeding to litigation. The high court set aside a settlement agreement concluded between the parties. It further ordered Mr. Ubisi's attorneys of record, Nel van der Merwe and Smalman Inc. (Smalman Inc), to pay the costs of the action including the costs of the experts, *de bonis propriis*. Mr Ubisi applied for leave to appeal against the order, which was refused by the high court. The appellants were granted leave to appeal by the Supreme Court of Appeal.

Background:

The matter was set down for hearing in the high court, in respect of quantum on 25 November 2021 before Honourable Justice Mbongwe. On the day of the hearing, the Road Accident Fund (RAF) sent

an offer of settlement in respect of the quantum to Smalman Inc. The offer was made in respect of general damages, loss of earnings, and an undertaking in respect of future medical expenses and costs. The determination of the quantum for past hospital and medical expenses was postponed *sine die*. On 16 February 2022, Smalman Inc. accepted the offer on behalf of Mr. Ubisi, by way of acceptance notice and prepared a draft order dated 6 May 2022 containing the settlement agreement. On 6 May 2022, the RAF consented to the draft order being made an order of court. The matter was placed on the settlement roll in the high court on 5 June 2022. Mr. Ubisi's counsel requested the court to make the settlement an order of court as agreed between the parties.

Mbongwe J indicated that the court is not a rubber stamp of settlement agreements and had to interrogate such offers and oversee matters. Mbongwe J further indicated that he was not satisfied with the amount agreed in respect of the general damages and loss of earnings and furthermore, the terms of the draft order. Judgment was reserved.

Written judgment was given on 1 August 2022, setting aside the settlement agreement concluded between the parties. It further ordered that Smalman Inc. to pay the cost of the action including costs of Mr Ubisi's experts *de bonis propriis*.

The issue before the appeal court related to the powers of a court when parties have settled their dispute, without proceeding to litigation.

It was argued by counsel that:

1. The high court was not justified on the material before it to make a finding that Mr. Ubisi was not entitled to payment of general damages, loss of income, past hospital and medical expenses, and costs. It is only in circumstances where the agreement contains terms which are unconscionable, illegal, and immoral that the court can refuse to make the settlement agreement an order of court.

Counsel further argued that the requirements had been met, as set out in the matter of *Eke v Parson (Eke)* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC), namely:

- i) The agreement was related directly or indirectly to the dispute or *lis* between the parties;
  - ii) It was not objectionable in that it must accord with the Constitution and the law and not be offensive to the public policy; and
  - iii) It held some practical and legitimate advantage.
2. By entering into a settlement agreement, the parties had brought the *lis* before the court to an end. Neither party challenged the validity of the settlement agreement, which rendered the settled issues *res judicata*. The high court, accordingly, lacked jurisdiction to set aside the settlement agreement.
  3. The high court set aside the settlement agreement on the grounds of fraud, without any evidence to support such a finding. It made adverse findings without affording the Attorneys an opportunity to be heard on the matter.

The legal position on how a court should deal with a settlement agreement brought by the parties to be made an order of court, was dealt with in the Constitutional Court in the matter of *Mafisa v Road Accident Fund (Mafisa)*, where it was stated that 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*.

The Constitutional Court further held that as a general rule, a judge should not interfere with the terms of the settlement agreement. A judge may, however, raise concerns in certain circumstances as contemplated in *Eke (supra)*.

The Constitutional Court emphasized that a judge is not entitled to demand the parties to address his or her concerns, it is upon the parties to elect whether to address the concerns or indicate to the judge that they regard the matter as settled between them.

Molefe JA further ruled that the high court's adverse findings of fraud and dishonesty against Mr Ubisi's legal team were inappropriate. There was no evidence to sustain or justify the court's findings of fraud and dishonesty.

The appeal was upheld, and the initial settlement agreement which was presented to Mbongwe J was made an order of court.

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