REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 24460/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

27/10/17
DATE

SIGNATURE

In the matter between:

MCUBUKA AMOS MZWAKHE Applicant

and

ROAD ACCIDENT FUND Respondent

J U D G M E N T

WEINER, J:

[1] The applicant in this matter sought an order for default judgment against the respondent and for payment of the sum of R302 953,00 plus interest.

[2] The respondent failed to enter an appearance to defend and accordingly the applicant applied for default judgment.

[3] The applicant contends that he was involved in a collision on the 29th November 2011 at or along the N1 Freeway Golden Highway Extension 13, Orange Farm. The collision occurred between a motor vehicle with registration number NP 147240 driven by one Mabuzo Mzwanda and the applicant who was a pedestrian.

[4] Applicant alleged that the collision was caused by the sole negligence and/or recklessness of Mzwanda and the grounds of negligence are set out. Applicant contends that he suffered severe bodily injury consisting of a fracture of the right fibula and a mild head injury. He accordingly claimed damages in the sum of R1 100 000,00 in respect of general damages (R500 000,00), past loss of income (R100 000,00) and estimated future loss of income (R500 000,00).

[5] The applicant issued summons on the 22nd June 2015. The respondent had previously conceded liability, but failed to file a plea in regard to quantum. The applicant applied for default judgment. The respondent appeared at the hearing. This Court was then presented with a draft order in terms of which the respondent agreed to pay the applicant an amount of R250 000,00 in settlement of his claim. This agreement was contained in a draft order. The court was requested to make it an order of court.

[6] In being requested to make this an order of court the court is not merely a rubberstamp. The court has a duty to investigate the matter and ascertain whether or not the agreement is one which should be made an order of court. This is even more essential when the respondent is a public institution whose finances and the administration thereof are in the public interest.

[7] As a result, I postponed the matter in order to peruse the court file and the various expert summaries to ascertain if the agreement of settlement should be made a court order.

[8] From the documents filed of record it appears that the RAF4 form was signed by the applicant's representative on the 28th March 2014 and the injury described as a fibula fracture.

[9] Thereafter several medico-legal reports were filed including reports of:-

9.1 Dr Read, an Orthopaedic Surgeon.

9.2 Dr Peta, a Clinical Psychologist.

9.3 Dr Segwapa, a Neurosurgeon.

9.4 Clara Sivhabu, an Occupational Therapist.

9.5 Dr Sugreen, an Industrial Psychologist; and an

9.6 Robert Koch, the actuary.

[10] The applicant was born on the 3rd March 1966 and is accordingly 51 years old. It is stated in certain of the reports that, at the time of the injury, he was employed by a Ms Mango as a gardener and was earning R300,00 a week that is R15 600,00 per year. Allowance was made for the claimant to be employed until age 64. It was stated in the actuarial report that it is assumed that the claimant "*will never again enter into gainful employment*". The applicant then claimed the amount stated by the actuary in the sum of R302 953,00.

[11] It is pertinent to state the following:-

11.1 The applicant fractured his fibula and received medical treatment immediately thereafter.

11.2 He was employed, according to the applicant, by his aunt as a part time gardener.

11.3 He has a St 6 Grade 8 level of education.

11.4 Since the accident, he has been unable to find any form of gainful employment.

11.5 The fracture was treated conservatively by way of a plaster cast.

11.6 The flexion in his right ankle has decreased by 5 degrees.

11.7 His present complaints are pain and stiffness in the right ankle and he is unable to walk far or fast.

[12] The Orthopaedic Surgeon stated that his symptoms will improve if he receives treatment as recommended but he would be better suited to a sedentary type occupation. However, Dr Read stated that the orthopaedic injury does not constitute a serious injury in regard to the effect on his employment.

[13] The Clinical Psychologist, Ms Peta stated that:

13.1 He was employed from 2004 to 2008 at Eveton Filling Station as a petrol attendant.

13.2 From 2009 to 2010 he was self-employed as a fruit and vegetable vendor.

13.3 Since 2011 he stopped working and is currently unemployed.

13.4 The applicant had been experiencing anxiety in regard to travelling and he has manifested moderate depression.

[16] Dr Segwapa concluded that the applicant has no neurophysical impairments. He also stated that:

"He was unemployed at the time of the accident. He remains unemployed to date."

[17] Ms Sivhabu refers to the fact that there is apparently a history of mental illness related to the applicant. She is of the opinion that "*he should be able to engage in some aspects of gardening tasks as long as he applies joint hygiene principles and limits the time spent in one position ...*". She states further that it would be difficult for him to find customers who will be willing to accommodate his limitation.

[18] Dr Sugreen, the Industrial Psychologist states that when the applicant was self-employed as a vendor he was earning approximately R200,00 per day. Later he expanded the goods that he sold and earned approximately R400,00 per day. In 2001 he worked for a Mrs Dipuo as a gardener and earned R400,00 a month. He returned to his vending business from 2002 to 2009 and earned approximately R500,00 per day.

[19] At the time of the accident, he stated that he worked for his aunt Mrs Thandi Mango and Ms Louisa Mango as a gardener. He earned R300,00 per week. Mrs Mango confirmed to Dr Sugreen that he would work approximately three days a week and earn R300,00 a week on the months that they had enough money otherwise he earned R300,00 per month. Dr Sugreen concludes that it is unlikely that he will return to any form of meaningful employment and should be compensated for loss of income.

[20] Having regard to all of the aforegoing, it is not clear whether the applicant was actually employed at all at the time of the accident. Some of the experts state that, in his history, the applicant stated that he was not employed at the time of the accident. If he was employed, it is not clear whether he earned R300 per week or per month. This court cannot, without more, accept that the applicant can never be gainfully employed.

[21] The agreement that the parties have concluded, in terms of which the applicant is to receive R250 000,00 is based solely upon his loss of earning capacity.

[22] I am unable to find on the documents before me that the applicant is entitled to any amount in respect of loss of earnings for the following reasons:

22.1 The issue as to whether he was actually employed remains unclear;

22.2 If he is unable to work as a gardener, he is able to work as a vendor selling the goods which he did before, when he was earning much more than the R300,00 a week/a month that he now claims to have been earning through Mrs Mango his aunt.

[23] Our courts are inundated with matters relating to the RAF and the Minister of Law and Order (in re unlawful arrest claims). The settlement

agreements reached often bear no association to the damages actually suffered. The reasons for this are not apparent, although speculation is rife in regard to the motives behind such settlements. For these reasons, our courts have to be vigilant when dealing with State funds. The court can tale judicial notice of the fact that the RAF claims that it is bankrupt. It is the court's duty to oversee the payment of public funds. The applicant must prove its claim with reliable evidence. The claim is for a substantial sum. The RAF, for reasons known only to it, has agreed to pay out this sum without any investigation into its validity. A court cannot allow that, when, on the face of it, the claim is based upon contradictory and flimsy evidence.

[24] Our courts have a duty to ensure that it does not grant court orders that are *contra bonos mores*. Thus, a court will not enforce a contract that is against public policy. The agreement, which the parties seek to enforce, is a contract between them based upon a compromise. In *Fagan v Business Partners Limited*[1] the court held:

> *[19] A compromise, defined as a settlement of litigation or envisaged litigation, is a substantive contract that exists independently of the original cause. .... The defendant contends that the compromise is contra bonos mores, void and unenforceable.*
>
> .....
>
> *[26] Stipulations in a contract which are unconscionable, illegal or immoral will have the result that a court will refuse to give effect thereto. A contract or term of a contract may be declared contrary to public policy if it is clearly inimical to the*

[1] 2016 JDR 0317 (GJ)

interests of the community, or is contrary to law or morality, or runs counter to social or economic expedience, or is plainly improper and unconscionable, or unduly harsh or oppressive. The criteria upon which a contract may be declared contrary to public policy is thus not sharply defined and changes with "the general sense of justice of the community, the boni mores, manifested in public opinion". .... See Brisley v Drotsky 2002 4 SA 1 (SCA) and Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division 2004(5) SA 248 (SCA)".

[23] The Court has had regard to the underlying facts upon which the agreement has been concluded. I am not satisfied that the Court should give effect to the agreement for the reasons stated above. The interests of the community, as a whole, demand that more scrutiny be involved in the disbursement of public funds.

[24] It is of course trite that an agreement can be enforced without a court order. In view of the fact that this agreement involves the payment of public funds, I am of the view that the amount claimed should not be paid out without a court order, in circumstances where there is judicial scrutiny.

[25] Accordingly I refuse to make the draft order an order of court. The matter must as if no agreement has been concluded, with the applicant being obliged to prove his claim.

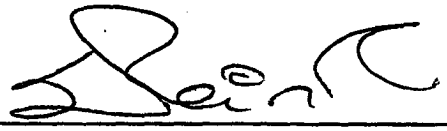
[26] The following order will issue:

26.1 The application for the draft order to be made an order of court is refused.

26.2 The matter is referred back to the Registrar for the purpose of pleadings to be filed.

26.3 The respondent is interdicted from paying to the applicant any amount in settlement of the entire claim without a court order first being obtained.

24.4 Each party is to pay their own costs.



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JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Counsel for respondents:	Advocate R. Manzini
Date matter heard:	17 August 2017
Judgment date:	26 October 2017