THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1175/2017

In the matter between:

PATRONACIA THEMBI MASWANGANYI **APPELLANT**
OBO TEBOHO MAIMELE MACHIMANE

and

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Maswanganyi obo Machimane v Road Accident Fund* (1175/2017) [2019] ZASCA 97 (18 June 2019)

Coram: Maya P and Wallis, Zondi and Mocumie JJA and Weiner AJA

Heard: 2 May 2019

Delivered: 18 June 2019

Summary: Delict – Settlement of damages claim against the Road Accident Fund – judge declining to make settlement agreement an order of court and requiring the trial to continue on the merits – application to declare trial a nullity – irregular procedure – Court's duty when asked to make settlement agreement an order of court.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Muller J, Phatudi and Semenya JJ concurring, sitting as court of appeal):

1. The appeal is dismissed.

2. There is no order as to costs.

JUDGMENT

Weiner AJA (Maya P and Wallis JA concurring):

[1] On the first day of the trial before Mokgohloa DJP in the Limpopo Division of the High Court, the parties concluded a settlement agreement. They asked the judge to make it an order of court, but she declined to do so and indicated that the trial should continue on the merits. Some evidence was led and the court adjourned. Thereafter an application was brought to halt the trial, declare it a nullity, and make the settlement agreement an order of court. The court dismissed that application and an appeal, with her leave, to the full court of the division (Muller J, Phatudi and Semenya JJ concurring), was also dismissed. This further appeal is with special leave of this court.

Background

[2] The appellant, Mrs Maswanganyi, on behalf of her minor child, issued summons against the Road Accident Fund (the 'RAF'). She averred that the child's father had been killed in a collision that occurred on 6 July 2014 and that the sole cause of the collision was the negligence of the insured driver. As a result of the death of the deceased, the appellant claimed that the minor child had been deprived of maintenance and support. His loss of support related to past loss of support in the sum of R200 000 and future loss of support in the sum of R800 000. Thus the claim

was for R1 million. The RAF defended the matter. The trial was set down for 12 September 2016. It was rolled over to 13 and then 14 September 2016. It was allocated to the DJP for her to preside over it. When the matter was called for the trial to commence on 14 September, the parties requested that the matter stand down as the parties were attempting to settle the matter. The judge stood the matter down, but informed the parties that she was ready to commence with the trial. The parties returned at 14h00 and requested the court to make the settlement agreement (the 'agreement') an order of court. The agreement provided that the RAF was liable to pay the appellant 100 percent of her proven or agreed damages. The damages were agreed in the sum of R561 314.63.

[3] The judge was not satisfied that the agreement should be made an order of court. She remarked that she had noticed that, according to the pleadings and certain of the witness statements, there was no indication that the insured driver was negligent at all. The deceased had attempted to overtake a bakkie that was in front of him. The collision occurred whilst the deceased was overtaking the bakkie when he collided with an oncoming vehicle being driven by the insured driver. There was nothing in the papers that suggested that the insured driver could have avoided the collision.

[4] The judge enquired from the RAF's counsel whether she was satisfied with the agreement. As appears from the record, counsel stated:

'MS MASHABA: M'lady we are not satisfied. The only challenge that I had . . . is that I was briefed on this matter yesterday. I tried to get hold of the insured [driver] . . . I actually did go through all the statements and realised that really we cannot actually find the 1%. So the insured driver had actually said he could not be here today. So since this matter was set down for trial today we realised we do not have any evidence to . . . counter what they are saying.'

[5] The judge refused to make the agreement an order of court. She required witnesses to testify as to how the collision had occurred. The trial commenced on 14

September. The respondent called Mohlehle David Maake,[1] a passenger in the deceased's vehicle, who commenced giving evidence. The matter could not be finalised, and was postponed *sine die* for a date to be arranged. Such date was later agreed to be 12 October 2016.

The Application

[6] On 7 October 2016, the appellant launched an application seeking the following relief:

'1. Calling off the part-heard trial in the matter which commenced on Wednesday, 14 September 2016 and postponed for continuation on Wednesday, 12 October 2016 at 10h00 in the forenoon.
2. That the said trial be and is hereby forthwith annulled.
3. Declaring that the *lis* between the Applicant and the Respondent which was to be the subject matter of the trial which was to commence on Wednesday, 14 September 2016 at 10h00 in the forenoon before this Court . . . to have been fully and finally settled between the parties in terms of the agreement and resultant draft order made and prepared by the parties and bearing the same date of Wednesday, 14 September 2016.
4. That the draft order in paragraph 3 above is hereby made an order of the Court.'

[7] The RAF did not oppose the application. It has played no part in either in the full court or in this court.

[8] The appellant alleged in her founding affidavit that the *lis* between the parties had been settled and that there was no basis, in fact or in law, for a hearing or a trial to take place. She contended that, in the face of an agreement having been concluded the proceedings and the trial, as well as the presiding judge's direction that the trial should proceed, were fatally flawed and irregular. The court no longer had the jurisdiction or power to continue to hear evidence and further pronounce on the matter.

The issues

[1] Referred to interchangeably as 'Mohlehle', 'Mohlewe', and 'Mahlenhle' in the record.

[9] There are two issues for decision. The first is whether it was permissible to challenge the Judge's decision in this way. Only if it was, do we reach the second issue, namely, whether her approach to the settlement agreement was permissible.

[10] The appellant argued that the procedure adopted to challenge the court's decision was well founded. The reasoning underpinning the argument was that the decision to settle the case was entirely a matter for the parties, in which the judge had no role to play. Once they had concluded the settlement there was no longer a *lis* between them. The effect was to deprive the judge of jurisdiction to adjudicate that non-existent *lis.* Her jurisdiction extended only to making the order that the parties asked her to make. Accordingly, when she refused to make the settlement an order of court and required evidence to be led on the question whether the insured driver had been negligent to any degree, she overstepped the limits of her jurisdiction. The resultant proceedings were a nullity and it was appropriate to seek an order declaring that to be so.

[11] The appellant relied upon *PL v YL*,[2] a divorce action, where the following was said:

'Once the parties to a civil action have reached agreement in relation to the issues raised by the action, and elected not to seek the relief claimed therein, the mandate of the court to determine those issues and to grant the relief claimed by the respective parties is terminated. Any order which is then granted by the court is simply made with a view to assisting the parties in resolving their disputes and facilitating the enforcement of the terms of their agreement . . . .

. . . .

This finding is premised on the adversarial model on which dispute resolution is based in our law, namely that the court's mandate or jurisdiction is determined by the lis between the parties. The court's authority in other words does not extend beyond the issues which the action is capable of raising, and which the parties themselves have raised in their pleadings.'

[12] The appellant submitted that *PL v YL* was authority for the submission that, once the parties reached an agreement, the court could not decide on other issues

[2] *PL v YL* 2013 (6) SA 28 (ECG) paras 14 and 25. (Footnotes omitted.)

raised in the pleadings as its mandate was determined by the *lis* between the parties and that *lis* had been resolved.

[13] The choice of language in the two paragraphs quoted above from the judgment in *PL v YL* was unfortunate and gives an incorrect picture of the legal position that arises when parties conclude a settlement agreement. Litigants do not mandate courts to decide disputes, and the language of agency or mandate is inappropriate to describe the judicial function. Nor should the jurisdiction of courts be conflated with the concept of mandate. Courts are the judicial arm of the State. They are charged, inter alia, with the determination of civil disputes that arise in the ordinary course of events. Their jurisdiction to do so is founded in Chapter 8 of the Constitution and defined in various statutes and the common law. In the case of the high court, the relevant statute is the Superior Courts Act 10 of 2013.

[14] Litigants seeking relief invoke the jurisdiction of a court, usually by way of an action or an application. The issues in any particular litigation will be determined by the pleadings or affidavits and may be expanded by the parties in the course of the proceedings. It is not for the court to vary the issues so defined.[3] But, once the case has been placed before the court for adjudication, it is obliged to adjudicate upon the issues it raises by rendering a judgment, unless the parties specifically withdraw all or some of the issues from judicial consideration. This can be done by abandoning a claim or defence, or by withdrawing the action or application in its entirety, subject to certain limitations.

[15] 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'.[4] Contrary to the passages quoted above, the jurisdiction of the court to resolve the pleaded issues does not terminate

[3] *Fischer & another v Ramahlele & another* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14.
[4] *PL v YL* 2013 (6) SA 28 (ECG) para 15, approved in *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) para 25.

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.

[16] 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. Its order is *res judicata* between the parties[5] and the issues raised by the parties may not be re-litigated. The fact that the court's jurisdiction remains intact when the parties settle a case is illustrated by *PL v YL* itself and the countless cases that come before our courts where parties to a matrimonial dispute settle their differences and the case proceeds on an unopposed basis. Notwithstanding the settlement, the court must have retained jurisdiction for the simple reason that otherwise the parties would not be divorced, as only a divorce order can bring about the termination of a legal marriage. The basic premise on which the appellant's argument was based was therefore incorrect.

[17] That conclusion is reinforced by the events in this case. The application was brought as an interlocutory application in the trial itself. It was lodged under the same case number and was brought before and heard by the trial judge. There is established authority that the decisions of the high courts are not subject to review. In *Pretoria Portland Cement Co Ltd v Competition Commission* this court held as follows:[6]

'[The High Court] is not itself the subject of review . . . . There are other means, quite sufficient means . . . by which the judgment of a Judge may be corrected. The primary means of correction of judicial error is appeal to a higher Court, which is appropriate where a Judge has reached a final decision.'

[18] When the court was asked to make the settlement agreement an order of court, the trial had been called on before her; counsel for the parties had announced their appearances and she had indicated that she was ready to proceed with the

[5] *Eke v Parsons* para 31.
[6] *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) paras 35-36.

matter.[7] When the court refused to make the agreement an order of court, the trial action remained alive, not having been terminated by either a judgment or a withdrawal. The evidence that was led was evidence in that trial. The appropriateness of the application as a means of reversing the court's refusal to make the settlement an order of court must be adjudicated against that background.

[19] The fundamental premise of the argument on the application was that the settlement put an end to the *lis* between the parties and thus deprived the court of any further jurisdiction. That premise has been shown to be incorrect. The court's jurisdiction was unaffected by the agreement, as evidenced by the fact that it was being asked both to adjudicate on the application and (once more) to make the agreement an order of court. This relief was being sought in the very action where it was claimed that the court had been deprived of its jurisdiction. The basis for the application – absence of jurisdiction – was therefore inconsistent with the relief being sought, which was that the same court, in the same action, should grant the relief prayed in the application. In order to grant that relief the court must have retained jurisdiction in the action. The settlement agreement had not put an end to it.

[20] Counsel pointed to no other authority that would have authorised the judge to 'call off' the part-heard trial and declare it to be annulled. The position therefore remained that the proceedings with which she was seized was an uncompleted trial in an action for damages. As the trial had not run its full course, there was no appealable judgment to be assailed in another court. The endeavour to create one by way of an interlocutory application in that trial could not succeed.

[21] The time at which that endeavour was made is also decisive. The authorities are clear that it is only in very rare circumstances that a court will review a decision, or allow an appeal before the proceedings have been terminated. As Howie P stated in *S v Western Areas Ltd*:[8]

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[7] It was submitted by counsel that the trial had not come before the DJP, but only been called in the roll call court, but that was inconsistent with the record which showed that it was allocated for trial before her.

[8] *S v Western Areas Ltd & others* [2005] ZASCA 31; 2005 (1) SACR 441 (SCA) para 25. (Footnotes omitted.)

'Long experience has taught that in general it is in the interests of justice that an appeal await the completion of a case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course.'

[22] Even where there is a power of review, as is the case with uncompleted proceedings in a magistrates' court, there is long-standing authority that such proceedings will not ordinarily be reviewed by the high court until they have run their full course, at which stage an appeal or review may be brought.[9] In *Ismail and others v Additional Magistrate, Wynberg & another*,[10] applying the decision in *Wahlhaus*, the following was stated:

'[I]t is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. . . . [W]here the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the . . . decision under appeal at a stage when no appeal lies.'

[23] The appellant's case was premised on the claim that the judge's decision was wrong. No appeal or interlocutory proceeding to reverse that decision lies whilst the proceedings are ongoing. The full court was therefore correct in holding that the application was misconceived and the relief sought in prayers 1 and 2 incompetent. The appellant submitted that she could still pursue prayer 3 if the relief sought in prayers 1 and 2 was ill-conceived. This concession was not made in the court a quo and, after finding that the relief sought was incompetent, the full court did not deal with prayer 3.

[24] I do not think that it was competent for the appellant to abandon those two prayers and seek to rely upon prayer 3 alone. The trial before the court has not ended. Issuing a declarator in terms of prayer 3 amounts, in effect, to reviewing the court's decision to continue with the trial. That is impermissible as demonstrated above in relation to the relief in prayers 1 and 2. The appeal must therefore fail.

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[9] *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A) at 119D-E.

[10] *Ismail & others v Additional Magistrate, Wynberg & another* 1963 (1) SA 1 (A) at 5H.

The settlement agreement

[25] Although it is not necessary to decide whether the court had the power to refuse to make the agreement an order of court, it is necessary to make some remarks in this regard. The issue of the court's discretion, in relation to making a settlement agreement an order of court, occurs frequently in courts throughout the country in damages claims against organs of State involving the disbursement of public funds.

[26] It is submitted by the appellant that the draft order which was presented to the trial judge complied with the relevant requirements of the Limpopo Practice Directives,[11] and that was all that was required. This submission cannot hold. A court's jurisdiction and/or discretion cannot be ousted by a practice directive, which deals only with procedural matters.

[27] The appellant argues that only in circumstances where the agreement contains terms which are unconscionable, illegal or immoral, can a court refuse to make the settlement agreement an order of court. She drew attention to the requirements set out in *Eke v Parsons,*[12] namely, that the settlement must relate directly or indirectly to an issue or *lis* between the parties; that its terms must accord

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[11] '6.12 **SETTLEMENT AGREEMENTS AND DRAFT ORDERS**

6.12.1 Where the parties to a civil trial have entered into a settlement agreement, a judge will only make such settlement agreement an order of court if:

6.12.1.1 Legal representatives representing all the parties to the trial are present in court and confirm the signature of their respective clients to the settlement and that their clients want the settlement agreement made an order of court; or

6.12.1.2 Proof to the satisfaction of the presiding judge is provided as to the identity of the person who signed the settlement agreement and that the parties thereto want the settlement made an order of court.

. . . .

6.12.3 Where the parties to a trial have settled before the trial date, they will be entitled to remove the matter from the trial roll and enrol it on a special roll call for "Draft Orders" that would be arranged by the Registrar.'

[12] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 25 and 26.

with both the Constitution and the law; and that it must hold some practical or legitimate advantage.

[28] However, this cannot mean that the court's discretion, concerning whether to make the agreement an order of court, is rendered nugatory. There are a number of cases that recognise the existence of such a discretion, although the real scope of it has not been delineated in any great detail.

[29] The court in *PL v YL* went further than the paragraphs relied upon by the appellant and referred to above. It stated:

'….not only does our substantive law favour the settlement of disputes by way of a contract of compromise, it has always been the practice of the courts . . . to . . . assist the parties by making settlement-based orders.

. . . .

That being said, it must be accepted that there exists a need for the court to retain a degree of control over agreements and consent orders and for it to scrutinise settlement agreements, the object in each case to ascertain and make a determination whether the terms thereof are appropriate so as to be accorded the status of an order of the court. It is however important to stress that the court's role is of a discretionary nature which should be exercised in light of all the relevant considerations including the benefits which the granting thereof may hold for the parties, and the general judicial policy favouring settlement. Each matter should be considered on its own merits. What it requires the court to do is to attempt to strike a balance between the different considerations relevant to the exercise of its discretion.'[13]

[30] In *Eke,* the Constitutional Court dealt with the principles set out in *PL v YL* and referred in particular to the question of a court's duty in such cases:[14]

'[*PL v YL*] says . . . . "If one is then to proceed from the premise that the wider interests under consideration [are those] of the administration of justice, then the Court is required, when exercising its discretion whether to make a settlement agreement an order of the court,

[13] *PL v YL* 2013 (6) SA 28 (ECG) paras 37 and 41.
[14] *Eke v Parsons* para 23, quoting from *PL v YL* para 38. See also *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15.

to give consideration not only to the need to make orders that are readily enforceable, but also to assess the wider impact which its order may potentially have."

. . . .

This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. . . .

. . . .

Secondly, [the agreement] must accord with both the Constitution and the law. Also, they must not be at odds with public policy. . . .

The less restrictive approach adopted in this judgment is in line with the wide power that courts have to regulate their process. This power is expressed in section 173 of the Constitution, which provides: "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

This is what this Court has said about inherent power: . . . "The power in s 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. *Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction*" [emphasis added]. . . .

. . . .

[This] does not mean any settlement order proposed by the parties should be accepted. The court must still act in a stewardly manner that ensures that its resources are used efficiently. After all, its "institutional interests . . . are not subordinate to the wishes of the parties". Where necessary, it must "insist that the parties effect the necessary changes to the proposed terms as a condition for the making of the order". It may even reject the settlement outright.'[15]

[31] Froneman J, on behalf of the majority in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd*[16] confirmed the principles emanating from *Eke*, and in particular that 'a settlement agreement between litigating parties can only be made an order of court if it conforms to the Constitution and the law'.

[15] *Eke v Parsons* paras 25-28, 34.

[16] *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165 (CC) para 13.

[32] Our courts have a duty to ensure that they do not grant orders that are *contra bonos mores*, or that amount to an abuse of process. Section 173 of the Constitution specifically empowers the Court to prevent any such abuses. Thus, a court will not enforce a contract that is against public policy. In *Fagan v Business Partners Limited* the court held as follows:[17]

'A compromise, defined as a settlement of litigation or envisaged litigation, is a substantive contract that exists independently of the original cause. . . . 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 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".' [emphasis added]

[33] As the full court in this matter held, a court cannot act as a mere rubber stamp of the parties. The full court referred, inter alia, to the usual requirement that moneys should be paid into the Guardian's Fund or that a *curator bonis* should be appointed. The draft order and settlement agreement did not contain such provisions, which the court as upper guardian of minors, must take into consideration. The court also has a duty to members of the public. Public funds are being disbursed and the interests of the community as a whole demand that more scrutiny be involved in the disbursement of such funds. The criteria are not as simple as the appellant would have this court believe, as is apparent from *Fagan*.[18] The court's duty extends further than considering only whether the terms are illegal or immoral. For present purposes, however, it is not necessary for us to attempt to circumscribe the precise ambit of that discretion. It is better that it is done on a case by case basis.

[34] The RAF is an organ of state, established in terms of s 2 of the Road Accident Fund Act 56 of 1996 (the Act). It is thus bound to adhere to the basic values and principles governing the public administration under our Constitution. Section

[17] *Fagan v Business Partners Limited* 2016 JDR 0317 (GJ) paras 19 and 26. (Emphasis added.) See also *Mzwakhe v Road Accident Fund* [2017] ZAGPJHC 342 paras 23-25.
[18] Supra.

195(1) requires, inter alia, that '[a] high standard of professional ethics must be promoted and maintained'; and that '[e]fficient, economic and effective use of resources must be promoted'.[19]

[35] In cases involving the disbursement of public funds, judicial scrutiny may be essential. A judge is enjoined to act in terms of s 173 of the Constitution to ensure that there is no abuse of process. Judges in all divisions have expressed concern that in many RAF cases, there is an abuse of process. Settlements are concluded where, for example, the substantial damages agreed to bear no relation to the injuries sustained.[20] In this case the judge had a legitimate concern that the only reason for the settlement was the lack of preparation of the RAF's case and that there may, in truth, as appeared to be the case from the evidence she heard from a passenger in the vehicle, have been no negligence on the part of the insured driver and thus no liability on the part of the RAF.

[36] Concern has been noted that to require a Judge to scrutinize every settlement in a RAF case would cause delays in the administration of justice. However, it is not every case that will require this form of judicial scrutiny. When a Judge expresses concern over the terms of a settlement, the court must ensure that those concerns are addressed by the parties to prevent an abuse of process and the unjustified disbursements of public funds.

[37] The agreement also lacked protection for the minor child, which the court, as upper guardian, is entitled to insist upon. In addition, the clause dealing with costs is unintelligible and unenforceable. On these grounds alone, a court would have been entitled to refuse to make the agreement an order of court.

[38] This court is indebted to the amicus curiae, Advocate Zietsman, who was asked to assist the court. He did so by filing heads of argument and making oral submissions at the hearing, for which we thank him.

Costs

[19] Section 195(1)(*a)* and *(b)* of the Constitution.
[20] *Mzwakhe v Road Accident Fund* [2017] ZAGPJHC 342 paras 23-25.

[39] The appeal herein is not opposed but the appellant sought costs from the RAF. It was argued that the RAF, in stating to the court a quo that it was not satisfied with the agreement, was a cause of the further proceedings. In my view, this submission cannot be upheld and accordingly no costs order will be made.

[40] The following order is made:
1. The appeal is dismissed.
2. There is no order as to costs.

_____

S E Weiner
Acting Judge of Appeal

Zondi JA dissenting (Mocumie JA concurring)

[41] I have read the judgment prepared by Weiner AJA. I regret that I cannot agree with my colleague that the appeal should be dismissed.

[42] In the judgment (paras 22 to 23) Weiner AJA concludes that the full court was correct in holding that the relief sought in prayers 1, 2 and 3 of the notice of motion was incompetent and that, in effect, it amounted to reviewing the decision of the court of first instance. I also disagree with Weiner AJA's conclusion that the failure of the settlement agreement to provide safeguards, regarding the management of the funds that would be paid pursuant to settlement, laid a sufficient basis for the court of first instance to refuse to make it an order of court. In fact, the inadequacy of the settlement agreement was never advanced as a ground of refusal.

[43] I agree with the identification of the issues set out in para 9 of my colleague's judgment, namely first, whether it was permissible to challenge the court's decision by way of the procedure followed by the appellant; and, secondly, whether the court's approach to the settlement agreement was permissible.

[44] In my view, the answer to the first question should be in the affirmative and the answer to the second question should be in the negative. In the result, I would uphold the appeal, set aside the order of the full court, and grant the relief sought in prayers 3 and 4 of the notice of motion.

[45] The background facts have been set out in detail in the judgment of Weiner AJA. The appeal, with the special leave of this Court, is against the dismissal by the full court of the Limpopo Division of the High Court, Polokwane of the appellant's appeal against the judgment by Mokgohloa DJP dismissing the appellant's application. In that application, the appellant had sought the following relief:

'1. Calling off the part-heard trial in the matter which commenced on Wednesday, 14 September 2016 and postponed for continuation on Wednesday, 12 October 2016 at 10h00 in the forenoon.
2. That the said trial be and is hereby forthwith annulled.
3. Declaring that the *lis* between the Applicant and the Respondent which was to be the subject matter of the trial which was to commence on Wednesday, 14 September 2016 at 10h00 in the forenoon before this Court under case number 1386/2015 to have been fully and finally settled between the parties in terms of the agreement and resultant draft order made and prepared by the parties and bearing the same date of Wednesday, 14 September 2016.
4. That the draft order in paragraph 3 above is hereby made an order of the Court.
5. That the costs payable by the Defendant in terms of paragraph 3 of the said draft order shall include travelling costs, the costs of this application and the hearing of Wednesday, 12 October 2016, as well as the costs of Senior Counsel where employed.'

[46] This application was launched following the refusal by the Deputy Judge President to make the settlement agreement an order of court; and directing that the trial should proceed despite the settlement agreement having been concluded by the parties. The basis of the application is set out as follows in paras 19 and 20 of the appellant's founding affidavit.

‘I am advised by my attorney that after receipt of the instructions from her, Senior Counsel appointed attended to the opinion and advice required – he opined and advised that the proceedings and trial as was required and directed by the Presiding Judge in the face of the agreement and settlement between the parties as per the draft order were, with respect, fatally flawed and irregular in that the settlement agreement in the form of the draft order represented a compromise and contract between the parties which has as its object the prevention, avoidance or termination of the *lis* and litigation before the Court with the further result that the Court, in the person of the Presiding Judge, no longer has and ceases to have the jurisdiction or power to resume and continue to hear evidence and further pronounce on the matter.

Put differently, the agreement as per the draft order put paid to any and all existing issues and disputes giving rise to the *lis* and litigation between the parties, with the result that there is no longer a live issue between the parties requiring evidence and active adjudication by the Court. Further legal argument in this regard will be presented before the Court at the hearing of the application.’

[47] The court dismissed the application, holding that it was not obliged to make the settlement an order of court since it was not satisfied that it was in accordance with the documents and pleadings filed of record. The high court nevertheless granted the appellant leave to appeal to the full court.

[48] The full court in para 3 of its judgment formulated the issue before it in these terms:

‘The appeal is mainly against the dismissal of the main relief that the pending trial proceedings before her is a nullity and that the *lis* between the parties had been settled. There is, therefore, in my judgment, no need to decide whether the court ought not to have taken cognizance of the witness statements in the court file or that the order to continue with the trial, despite the settlement, was correct.’

[49] In its view, the judge ‘was called upon in the motion proceedings, to reconsider her earlier decision and to declare her order to continue with the trial after some evidence had been adduced, a nullity’.

[50] In accordance with its formulation of the issue, the full court concluded that the relief sought by the appellant was incompetent because 'the proceedings before the deputy judge president have not been concluded and are still pending'.[21] According to the full court, the procedure followed by the appellant was flawed, because in terms of that procedure the presiding judge was called upon to review her own decisions in the motion application. The primary means, the full court reasoned, to correct a judicial error by a judge who has made a final decision is by way of an appeal to a higher court.

[51] In my view, the full court misconstrued the nature of the appellant's application and the purpose of the relief that the appellant was seeking in that application. The suggestion that the appellant should have followed the appeal procedure is not correct, having regard to the stage at which the proceedings were when the application was launched. The proceedings which were sought to be called off were still pending and it would not have been in the interests of justice for the parties to await the completion of the proceedings before taking any further steps. The relief that the appellant sought did not depend for its consideration on the outcome of those proceedings. The parties, after agreeing to settle the dispute, were no longer interested in engaging any further in the legal proceedings. Accordingly, they should not have been forced into the position to risk incurring more legal costs before their legal position as regards the settlement could be authoritatively decided.

[52] As the amicus curiae correctly pointed out in his heads of argument, the appellant's application had, as its aim, the calling off of the part-heard trial; declaring the trial to be forthwith annulled; declaring the *lis* between the parties to have been fully and finally settled in terms of the agreement and resultant draft order; and to make the draft order an order of court. That is essentially the relief that the appellant sought. The procedure followed might not have been without difficulties. But to non-suit the appellant because of how she presented her application, is to place form above substance.

[21] Para 8 of the judgment of Muller J.

[53] It appears from the papers that, before the hearing of the application, both counsel for the parties approached the judge to persuade her to reconsider her earlier decisions. In this regard the appellant says in para 23 of her founding affidavit:

'The purpose of . . . the parties' Counsel [approaching the Presiding Judge in chambers] would be, as a matter of courtesy, to informally suggest to the Presiding Judge that the situation and matter be resolved or rectified in a manner along the lines of the relief as sought in the notice of motion to which this affidavit is annexed, failing which this substantive application will be formally placed before the Presiding Judge for hearing and decision.'

[54] In my view, the relief sought in para 3 of the notice of motion, viewed in the context of the application, the purpose to which it was directed, and the background to the application, was competent and ought to have been granted; and so, too, the relief sought in para 4 of the notice of motion.

[55] The next issue to consider is the effect of the settlement agreement concluded by the parties. Madlanga J, writing for the majority of the Constitutional Court in *Eke v Parsons*,[22] had the following to say in this regard:

'The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, "a matter judged"). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a mandamus.

Litigation antecedent to enforcement is not necessarily objectionable. That is so because ordinarily a settlement agreement and the resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute ─ depending on the nature of the litigation ─ might have entailed many days of contested hearing.'

[22] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 31-32. (Footnotes omitted.)

[56] It is correct that when a court is called upon by the parties to make a settlement agreement an order of court, it does not have to do so. It has a discretion. In this regard, Madlanga J said the following in *Eke:*[23]

'This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place, "relate directly or indirectly to an issue or *lis* between the parties". Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. On this *Hodd* says:

"(I)f two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to court to have that agreement made an order, merely on the ground that they preferred the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies against possible breaches, it seems clear that the court would not grant the application."

That is so because the agreement would be unrelated to litigation.

Secondly, "the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order". That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must "hold some practical and legitimate advantage".'

[57] It is apparent from this analysis that no discretion can be exercised in the air. If the court is to exercise its discretion against making a settlement an order of court, there must be a basis for it to do so. That basis may be gleaned from the facts pleaded before it by the parties or objectively available factors. What this means is that, for the court to be able to make the settlement an order of court, it must have jurisdiction, that is to say, the power to adjudicate upon, determine and dispose of a matter.[24] The court must be satisfied that the order that it is required to make is competent and proper in the sense that it will have the power to compel the person against whom the order is made, to make satisfaction. Secondly, it must satisfy itself

[23] *Eke v Parsons* para 25. (Footnotes omitted.)
[24] D Pistorius *Pollak on Jurisdiction* 2 ed at 2.

that the agreement is not objectionable and that it must hold some practical and legitimate advantage. Where necessary, the court must play an oversight role when it is of the opinion that the terms of the agreement are inadequate. In such instances it may even insist that the parties effect the necessary changes to the terms of the settlement agreement as a condition for the making of the order.

[58] This analysis makes it clear that the court has a discretion to make a settlement an order of court. In exercising its discretion, it must consider all relevant factors in light of the guidelines set out by the Constitutional Court in *Eke.* As indicated, in the present case the trial court refused to make the settlement agreement an order of court on the ground that it was not satisfied that it was in accordance with the documents and pleadings filed of record.

[59] In my view, this was an irrelevant consideration and its effect was to second-guess the parties' decision to agree to settle the issues as they defined them in their pleadings. It is not for the court to vary the issues so defined. It is for the parties to drive the litigation process. It must be recalled that, when the matter was called by the court of first instance, counsel for the respondent informed the court that the parties were busy negotiating settlement and when it was later called, the parties informed the court that they had settled.

[60] It was not suggested that the order which the parties requested the court to make was improper or incompetent, or that the agreement to settle was in any way objectionable or was as a result of any collusion between the parties. None of these were raised with the parties and for that reason it could not have been used as a ground to refuse to make the settlement agreement an order of court.

[61] In my view, the relief sought by the appellant in prayers 3 and 4 of the notice of motion was competent and should have been granted.

[62] In the result I would have made the following order:

1. The appeal succeeds.

2. The order of the full court of the Limpopo Division of the High Court, Polokwane is set aside and substituted with the following:

‘(a) It is declared that the *lis* between the appellant and the respondent which was to be the subject matter of the trial which was to commence on Wednesday, 14 September 2016 before the Limpopo Division, Polokwane under case number 1386/2015 to have been fully and finally settled between the parties in terms of the agreement and resultant draft order made and prepared by the parties and bearing the same date of Wednesday, 14 September 2016.

(b) The draft order referred to in para (a) above is hereby made an order of the court.’

3 No order is made as to costs.

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D H Zondi
Judge of Appeal

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Counsel for Respondent:	None
Amicus Curiae:	P J J Zietsman