THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1888/2019

In the matter between:

EPHRAIM MOGALE LOCAL MUNICIPALITY **Applicant**

and

ADV JIMMY HLONGWANE *N.O* **First Respondent**

MONICA MATHEBULA **Second Respondent**

Heard: **23 May 2023**

Delivered: **07 June 2023**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 07 June 2023.

JUDGMENT

PRINSLOO J

Introduction

[1] In *Minah v Elias Motswaledi Local Municipality*[1] *(Minah),* the Court stated that the national shame that became known as *'The Great Bank Heist'* relating to

[1] [2019] 5 BLLR 481 (LC) at para 1.

the spectacular collapse of the VBS Mutual Bank continues to rear its ugly head in this and other Courts. This matter is unfortunately another one.

[2] There are three applications before this Court, which I will deal with in turn, which all display sheer incompetence, alternatively a wilful disregard of the applicable prescripts on different levels. It is almost unimaginable that a single case can display such spectacular incompetence or ignorance or wilful disregard for what is right and wrong, for what is moral and what is not and what is expected of municipalities and their officials and councils.

[3] This is a case where the parties turned to this Court to fix the consequences of the incompetence, alternatively the wilful disregard of applicable prescripts. The reality is that this Court is not a fixer, but is a Court of law that can grant relief only insofar as the relief sought falls within the confines of the law.

Background facts

[4] The Second Respondent (Respondent) was appointed as the Applicant's municipal manager (MM) on 1 July 2017. The Local Government: Municipal Finance Management Act[2] (MFMA) imposes responsibilities on a municipal manager as the accounting officer of a municipality to ensure that effective, efficient and transparent systems of financial risk management are maintained and that reasonable steps are taken to ensure that the resources of the municipality are used effectively, efficiently and economically.

[5] Section 7(3)(b) of the MFMA prohibits the municipality from opening a bank account with an institution that is not registered as a bank in terms of the Banks Act[3]. Section 10(1) of the MFMA imposes an obligation on the accounting officer to enforce compliance with section 7(3)(b) of the MFMA in relation to the financial institutions with which the municipality may invest surplus funds.

[6] The Applicant's surplus funds were invested with FNB, a registered financial institution in terms of the Banks Act. In September 2017, the Respondent requested the transfer of the Applicant's funds from FNB and for it to be invested with VBS Mutual Bank (VBS). VBS was not registered as a bank in

[2] Act 56 of 2003.
[3] Act 94 of 1990.

terms of the Banks Act and as such, the Applicant was prohibited from opening a bank account with VBS.

[7] Notwithstanding the clear provisions of the MFMA and the Municipal Investment Regulations[4], the Respondent, during her tenure and under her watch, invested R 80 million with VBS.

[8] In May 2019, the Applicant charged the Respondent with misconduct, relating to the contravention of certain provisions of the MFMA and the Municipal Investments Regulation. The charges related *inter alia* to misconduct in that the Respondent acted in contravention of section 7(3)(b) of the MFMA when a bank account was opened with VBS, which was not registered as a bank and contravention of section 10(1) of the MFMA in that she failed to exercise oversight and failed to enforce compliance with section 7(3)(b). A total of five charges were levelled against the Respondent.

[9] A disciplinary hearing was held during May 2019, and the First Respondent (Hlongwane) acted as the chairperson. The Respondent pleaded guilty to most of the charges levelled against her. The Applicant submitted that the misconduct was serious and warranted dismissal as it constituted a failure to comply with or a contravention of the MFMA, the misconduct caused severe damages to the municipality and the Respondent's contract provided that her contract could be terminated if she was found guilty of serious misconduct.

[10] The Respondent submitted that she had a clean disciplinary record and that discipline should be corrective and not punitive. On 25 May 2019, Hlongwane issued a ruling wherein he found that there was not sufficient evidence to demonstrate that the Respondent was grossly negligent and that her misconduct was of such a serious nature that it warranted dismissal. He found that she was misled, that the provincial treasury could have done more to ensure that municipalities were aware that they were not permitted to invest with VBS and that with the necessary support and training, she could improve her knowledge of investments and finance, further that she pleaded guilty and showed remorse and therefore she was not dismissed but suspended without pay for a period of three months.

[4] GNR 308 of 1 April 2005.

[11] Not surprisingly, the Applicant subsequently filed an application to review and set aside the disciplinary outcome and sought an order for the sanction to be substituted with a sanction of dismissal. The gist of the review application was that the sanction imposed by Hlongwane was irrational and unreasonable, given the seriousness of the misconduct, the senior position held by the Respondent and the breakdown of the trust relationship. Hlongwane placed too much emphasis on the Respondent's clean disciplinary record in circumstances where dismissal was warranted.

[12] In my view, this is where two instances of incompetence were displayed. Firstly, the Respondent's incompetence as MM was obvious. I agree with the *dicta* in *Minah* where the applicant was a municipal manager too who invested municipal funds with VBS. It was held that:

> '20.2 What is further disconcerting in this case is that the applicant claimed to have been not aware of the applicable prescripts insofar as the investments with VBS were made. Any accounting officer in the position of a Municipal Manager ought to be aware of his or her financial and fiduciary obligations under the provisions of the MFMA, the PMFA and other regulations governing the financial affairs of a municipality and its related entities, and be fairly familiar with those provisions. To claim ignorance of the law under such circumstances can only either point to sheer incompetence on the applicant's part, or at worst, a complete and wilful disregard of these prescripts, which if not checked, the respondent might see a repeat.'

[13] Secondly, Hlongwane's incompetence as a chairperson is obvious. The Respondent pleaded guilty to serious transgressions, which pointed to either her sheer incompetence or wilful disregard of the prescripts and dereliction of duties. He ignored the seniority of the position she held, the consequences of her misconduct and the seriousness of transgressing provisions of the MFMA. Hlongwane had no idea of how to go about the serious charges the Respondent faced and pleaded guilty to and he was fixated on her clean disciplinary record, ignoring all other material factors, which justified the Respondent's dismissal. How could he expect the Applicant to keep her in its employ, with the expectation that she could be trusted to perform her duties with due diligence and care, and in compliance with the applicable legislation, in view of the facts placed before him?

[14] The Applicant acted with due diligence in seeking to set aside the outcome of the disciplinary hearing. However, instead of pursuing the review application and before the review application could be adjudicated, the Applicant entered into a settlement agreement with the Respondent. The settlement agreement is the subject of two applications before me.

The settlement agreement

[15] On 27 August 2020, the Applicant's council took a resolution on 'an out of Court settlement' on the matter between the municipality and the Respondent and resolved that:

> '1. That council settles the matter with the municipal manager.
>
> 2. That council pay the municipal manager twelve (12) months' salary in full and finalise (sic) settlement.
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> 3. That the municipality (sic) manager must tender her resignation immediately upon acceptance of the settlement proposal.
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> 4. That the offer is open for acceptance within a period of five (5) days from the date is communicated to the attorneys representing the municipal manager.
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> 5. That each party pays his/her own costs.
>
> 6. That the offer is made in full and final settlement of the matter.
>
> 7. That the MEC of the province responsible for local government be notified of the council decision.
>
> 8. That the acting municipal manager implement the recommendations.'

[16] The parties subsequently concluded a settlement agreement in the following terms:

> '1. TERMS OF SETTLEMENT
>
> 1.1. Without any admission of liability, the applicant shall pay to the second respondent, in settlement of the aforementioned dispute, an amount of R 1 292 449.00 (one million two hundred and ninety-two thousand and four hundred and forty-nine rand),

being the second respondent's twelve (12) months' salary, less income tax in full and final settlement of the dispute between the parties.

1.2. The second respondent shall tender [her] resignation immediately upon signature of this agreement.

1.3. The settlement amount at paragraph 1.1 above is to be paid, directly into Mrs MM Mathebela's banking account, within 30 days of signature by parties and/or settlement agreement having been made an order of court.

1.4. The settlement amount at paragraph 1.1 would not bear any interest if payment is made within the period stipulated at paragraph 1.3

1.5. In the event of failure by the Applicant (Ephraim Mogale Local Municipality) to pay the settlement amount at paragraph 1.1 within the period stipulated at paragraph 1.3 above, the settlement amount shall accumulate interest after expiry of the thirty (30) days to the date of payment (sic), which interest shall be calculated at the prescribed rate of interest per annum.

1.6. Should the Applicant (Ephraim Local Municipality) fail to pay the settlement amount at paragraph 1.1 within the period stipulated at paragraph 1.3, the second respondent (Ms. MM Mathebela) may proceed with execution against the applicant, to seek compliance with the settlement agreement or order of court and the applicant will bear the costs of execution on a party scale.

1.7. The Applicant will issue the second respondent with a certificate of service within thirty (30) days of signature of the settlement agreement.

1.8. That each party to pay its own costs.

2. AUTHORITY TO ENTER INTO SETTLEMENT AGREEMENT

2.1. Each person signing this agreement in a representative capacity warrants that he or she has full authority to bind his or her principal to this agreement.

3. CONFIDENTIALITY

3.1. It is understood between the parties that the agreement will strictly be confidential and without prejudice.

3.2. Negotiations discussions, written and oral communications, any draft resolutions, and any unsigned negotiations agreements shall not be admissible in any court proceeding, unless such information is discoverable in terms of the normal rules of court. Only a negotiation agreement/settlement, signed by the parties may be so admissible.

3.3. The parties further agree not to call the witnesses to testify concerning the agreement or to provide any materials from the negotiations in any court proceeding between the parties.

3.4. The parties understand that they have an ethical responsibility to break confidentiality if he/she suspects another person may be in risk of harm.

4. ORDER OF COURT

4.1. That the settlement agreement be made an order of court.

5. NON-VARIATION AND WAIVER

5.1. The parties agree that any amendment, waiver, or variation of any term of this agreement must be in writing and signed by all parties.'

[17] It is apparent from the signed settlement agreement that the parties agreed that the Applicant would pay the Respondent 12 months' salary in full and final settlement of the dispute between the parties, that the Respondent would resign upon signature of the agreement and that the Applicant would pay the settlement amount directly into the Respondent's bank account within 30 days of signature thereof.

[18] The Respondent tendered her resignation, albeit not in accordance with the terms of the settlement agreement and the Applicant accepted her resignation. The Respondent had to tender her resignation immediately upon signature of the settlement agreement, which was signed on 12 October 2020. On her own

version, she only tendered her resignation on 20 November 2020 and received her last salary in December 2020. The Applicant did not make payment to the Respondent, as agreed.

The applications before Court

[19] In November 2020, the Respondent approached this Court for an order to make the settlement agreement an order of Court in terms of the provisions of section 158(1)(c) of the Labour Relations Act[5] (LRA). The application is opposed.

[20] In December 2020, the Applicant filed an application for an order declaring that the settlement agreement entered into by the parties, is unlawful and that it be set aside. The Respondent opposed the application.

[21] Only in the event that the settlement agreement is declared unlawful and is set aside will the Applicant's review application be considered.

[22] In my view, the application to set aside the settlement agreement is to be considered first.

The setting aside of the settlement agreement

[23] The settlement agreement was in full and final settlement of the dispute between the parties and at the time that it was concluded, both parties were legally represented. In fact, the Applicant stated that the settlement agreement was signed on the advice of its legal representative.

[24] The Applicant seeks an order to declare the settlement agreement unlawful and for it to be set aside on the grounds that the agreement is unlawful and that it was not approved by the council.

[25] There is a council resolution which approved the out-of-court settlement with the Respondent and there is no merit in the averment that it was not approved by the council.

[5] Act 66 of 1995, as amended.

The legal principles

[26] A compromise is a contract between two or more persons which has, as its object, the prevention, avoidance or termination of litigation. Contractual principles apply to any agreement entered into between an employer and employee, including an agreement of compromise in terms of which parties agree to settle any dispute or claim that may exist between them.[6]

[27] In *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and others,*[7] it was held that:

> '…The purpose of a *transactio* is not only to put an end to existing litigation but also to prevent or avoid litigation. This is very clearly stated by Domat, Civil Law, vol 1, para 1078, in a passage quoted in *Estate Erasmus v* Church, 1927 T.P.D 20 at p. 24, but which bears repetition:
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> > "A transaction is an agreement between two or more persons either to end litigation or to prevent litigation resulting from the differences between them. It is most closely equivalent to consent judgment."
>
> A *transactio*, whether extra-judicial or embodied in an order of Court, has the effect of *res judicata*… It is obvious that, like any other contract (and like any order of Court), a *transactio* may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is *justus*…
>
> I am not aware of any reason why *justus error* should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.'

[28] In *SA Municipal Workers Union and others v City of Johannesburg Metropolitan Municipality,*[8] the Labour Appeal Court (LAC) considered the nature of an agreement in full and final settlement and held that:

> 'An agreement more often is a product of compromise between two or more

[6] *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and another* (2016) 37 ILJ 902 (LAC) at para 12.
[7] 1978 (1) 914 (A) at 921B – 922H.
[8] (2013) 34 ILJ 1944 (LAC) at para 20.

parties. In most cases, it is embodied in a written document which records the compromise made and is held up as an enforceable deal. The written agreement is therefore conclusive as to the rights and obligations of the parties.'

[29] The legal position is this: a person is bound by the terms of a signed agreement and the signed agreement is conclusive as to the rights and the obligations of the parties. *In casu,* the Applicant seeks to resile from the settlement agreement on the ground that it is unlawful.

[30] The question is whether the settlement agreement is unlawful.

Analysis

[31] The Applicant submitted that after the settlement agreement was signed, it realised that the municipality was ill-advised to enter into such an agreement in respect of the review application. To the Applicant, it does not make sense to use taxpayers' money to compensate the Respondent, who had unlawfully invested an amount of R 80 million, which had not been recovered.

[32] In my view, this is the third instance of a display of incompetence. The Applicant is correct that it does not make sense to use taxpayers' money to compensate the Respondent, who pleaded guilty to serious misconduct and who had unlawfully invested an amount of R 80 million, which caused a severe financial loss to the municipality and the ratepayers. The Applicant not only accepted such ill advice but acted upon it. One would expect the Applicant's council to consider the proposal before it is approved, yet the council approved a settlement and also mandated the acting MM to implement it. The acting MM, Mr Phaala, entered into the agreement and signed it in full and final settlement. At no point did the Applicant, its council or Mr Phaala think that it made no sense to use taxpayers' money to compensate the Respondent, who had unlawfully invested an amount of R 80 million. Instead of rejecting the poor legal advice they had allegedly received and applying some logic and sense, they approved the settlement and signed it.

[33] It was only after signing the agreement that it dawned on the Applicant that it would not make sense to compensate the Respondent for her conduct, and too late the Applicant got a sense that it had a responsibility to protect

taxpayers' money and that such cannot be used to reward the Respondent for her serious misconduct, and that in the excessive amount of a full years' compensation. This is indicative of the fact that no thought went into the rationality of entering into the settlement agreement and that the agreement was entered into without having the interests of the municipality or the ratepayers in mind, which raises serious questions as to the competence of the individuals who approved and signed the agreement.

[34] Mr Phaala, who signed the settlement agreement on behalf of the Applicant, is now the deponent in the application to declare it unlawful and to set it aside.

[35] The fact that the Applicant realised late that it was ill-advised by its legal representatives, or that it has a belated sense of responsibility in respect of the responsible spending of taxpayers' money or the fact that it, subsequent to signing the agreement, experienced some sense of 'buyer's remorse' does not render the agreement unlawful.

[36] The Applicant has not in any respect disclosed to this Court how it was ill-advised and nothing more than a sweeping allegation is made regarding the averment that it was ill-advised.

[37] In short: ill advice does not render the settlement agreement unlawful.

[38] The Applicant further submitted that the settlement agreement is unlawful and must be set aside because it is contrary to good governance and accountability.

[39] Good governance is a concept with many definitions and it applies in many spheres. In simple terms, it refers to efficient and effective decision-making processes and systems and the management of resources.

[40] Be that as it may, it is trite that the Applicant's case should be made out in its founding affidavit.

[41] The Applicant's case in its founding affidavit is that the settlement agreement is unlawful and must be set aside because it is contrary to good governance and accountability. This is so, according to the Applicant, because rewarding the Respondent for her wrongdoing, is unlawful.

[42] In *Northam Platinum Ltd v Fganyago NO and others,*[9] it was held that:

> 'In my view the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit.'

[43] In the heads of argument, Mr Makuya for the Applicant made out a case that is nowhere to be found in the founding affidavit namely that the settlement agreement should be set aside as it offends public policy, is unfair and unreasonable. He submitted that the court should refuse to give effect to a contract that is illegal, immoral or unconscionable and that a contract may be declared contrary to public policy. Public policy is *inter alia* the general sense of justice in the community, the *boni mores*, manifested in public opinion.

[44] Mr Makuya submitted that in cases involving the disbursement of public funds, judicial scrutiny is essential and that a judge is enjoined to act in terms of section 173 of the Constitution[10] to ensure that there is no abuse of process.

[45] I must emphasize that the arguments put forward in the Applicant's heads of argument are not reflecting the Applicant's pleaded case and no averments in the founding affidavit had been made in support of the arguments put forward in the heads of argument. For instance, in the heads of argument, the Applicant submitted that this Court should consider the reasonableness of the settlement agreement, in light of all the evidence and if the agreement is so unreasonable to be contrary to public policy, the Court should strike down the agreement. If the agreement is found to be reasonable, the Court should embark on a second stage of the enquiry to wit whether it would be contrary to the public policy to enforce the agreement.

[46] The Applicant's case in its founding affidavit is that the settlement agreement is unlawful and must be set aside because it is contrary to good governance. This does not render the agreement unlawful.

[9] (2010) 31 ILJ 713 (LC) at para 27.
[10] Constitution of the Republic of South Africa, 1996.

[47] The relief sought by the Applicant in its notice of motion is also not that the settlement agreement be declared to be contrary to public policy or *contra bonos mores,* void and unenforceable.

[48] The Applicant, and more specifically its accounting officer, is responsible in terms of the provisions of the MFMA to ensure that reasonable steps are taken and that the resources of the municipality are used effectively, efficiently and economically. Taking these steps would be critical to ensure good governance.

[49] In my view, the council resolution which approved the settlement agreement is contrary to good governance and accountability and the council and the accounting officer dismally failed in the duty they have in that regard by approving and signing such agreement. That, however, does not render the agreement unlawful. The better approach would have been to approach a competent court to set aside the council resolution, in terms of which the settlement agreement was approved.

[50] I am not convinced that a case has been made out for the relief sought by the Applicant.

The section 158(1)(c) application

[51] The Respondent seeks an order to make the settlement agreement an order of Court in terms of the provisions of section 158(1)(c) of the LRA.

[52] The Respondent's case is that the parties had entered into a settlement agreement, she had resigned in terms of the agreement but the Applicant has failed to make payment, as agreed.

[53] The Applicant opposed the application for the settlement agreement to be made an order of Court and in its opposition, referred to the misconduct the Respondent was charged with and pleaded guilty to. The Applicant submitted that this Court should not rubber stamp or endorse the settlement agreement because of the R 80 million that the Respondent caused to be invested at VBS, unlawfully so, which was public funds and had not been recovered. Furthermore, the National Treasury has directed that the lost monies be recouped from the responsible individuals, including the Respondent. On 20

October 2020, the Applicant's council resolved to institute civil action against the Respondent to recover the money invested with VBS from the Respondent.

[54] The Applicant submitted that this Court cannot be used to perpetuate the illegality by endorsing the settlement agreement in terms of which the Applicant has to pay the Respondent an exorbitant amount of money (12 months' salary) in circumstances where there is a large amount of money to be recovered from the Respondent due to her unlawful conduct.

[55] The Applicant submitted that the Respondent cannot be rewarded for her unlawful conduct and that at the expense of the public purse. The Respondent's misconduct resulted in a loss of R 80 million and she cannot be compensated in circumstances where the right thing to do instead is to recover the lost money from her.

[56] The Applicant's case is that the settlement agreement should not be made an order of Court because if it is endorsed by this Court and executed, it would perpetuate the unlawfulness and be against the principles of good governance and accountability, which apply to the use of public funds. This Court has a duty to protect the public purse and not grant orders that would be to the expense of the public purse.

Legal principles

[57] Section 158(1)(c) of the LRA provides that this Court may make any arbitration award or any settlement agreement an order of the Court. The Court has a discretion in this regard.

[58] In *SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-Time Employees*[11] *(SAPO),* the LAC held that:

> 'The purpose of making a settlement agreement or an arbitration award an order of court is to enforce compliance with the agreement or the award. The agreement or the award must therefore be unambiguous and unequivocal and not open to any dispute. This does not mean that an award or agreement that provides for payment of salary or wages for a certain period is not clear and precise. The parties could know or easily ascertain by having regard to

[11] (2014) 35 ILJ 455 (LAC) at para 21.

documentation like payslips or an independent accounting exercise what the amount is (although ideally the amount should be clearly set out to avoid unnecessary delays and expensive exercise to ascertain the exact amount due). What all this means is that before the Labour Court will grant an order sought in terms of s 158(1)*(c)* of the LRA it must be satisfied that, at the very least:

(i) the agreement is one which meets the criteria set in s 158(1)*(c)* read with s 158(1A) of the LRA, and if it is an award, that it satisfies the criteria set in s 142A of the LRA;

(ii) that the agreement or award is sufficiently clear to have enabled the defaulting party to know exactly what it is required to do in order to comply with the agreement or award; and

(ii) there has not been compliance by the defaulting party with the terms of the agreement or the award.'

[59] In *SAPO,* the LAC further held that:

'Once the Labour Court is satisfied with all of the above then it must, nevertheless, exercise its discretion whether to grant or refuse the order. In exercising the discretion, the court must take relevant facts and circumstances into account, such as are necessary to satisfy the demands of the law and fairness. Necessarily, each case must be decided on its own facts and circumstances. There is, otherwise, no closed list of factors to be taken into account. A relevant factor is the time it took the party seeking the relief to launch the application to make the settlement or award an order of court. The Labour Court may, for example, be more reluctant to make an award for reinstatement of employees an order of court where the employees unreasonably delayed in seeking the enforcement of the award, yet a delay of years in seeking to make an award for payment of a sum of money may not be grounds for refusing to make the award an order of court. Finally and most crucially it must be remembered that the purpose of making an agreement or award an order of the Labour Court is to compel its enforcement, or enable its execution and not for some other purpose.'[12]

[12] *SAPO* at para 22.

[60] In *Eke v Parsons,*[13] the Constitutional Court considered whether a settlement agreement should be made an order of Court and held that:

> '[25] 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…
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> [26] 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".' [Footnotes omitted]

[61] This Court has a discretion to make a settlement agreement an order of Court and in exercising that discretion, the relevant facts and circumstances must be taken into consideration, such as are necessary to satisfy the demands of law and fairness.

[62] *In* casu, taking the relevant facts into account and considering the demands of law and fairness, this Court is not inclined to make the settlement agreement an order of Court.

[63] Mr Makuya submitted that this Court should exercise judicial scrutiny to ensure that there is not an abuse of process in cases involving the disbursement of public funds. For this argument, Mr Makuya placed reliance on *Maswanganyi v Road Accident Fund*[14] (*Maswanganyi*) and *Mzwakhe v Road Accident Fund*[15] *(Mzakhe).*

[64] In *Maswanganyi*[16]*,* the Supreme Court of Appeal (SCA) held that:

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[13] 2016 (3) SA 37 (CC) at paras 25 – 26.
[14] 2019 (5) SA 407 (SCA).
[15] 2019 JDR 0417 (GJ).
[16] *Maswanganyi* at paras 32 – 36.

'[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*[17] the court held as follows:

"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*. 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.

[17] 2016 JDR 0317 (GJ) at paras 19 and 26. See also *Mzwakhe v Road Accident Fund* [2017] ZAGPJHC 342 at paras 23 - 25.

Section 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'.

[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. In this case the judge had a legitimate concern that the only reason for the settlement was the lack of preparation in 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 scrutinise 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.'

[65] In *Mzwakhe,*[18] it was held that:

'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.'

[66] In *Mzwakhe*, the Court found that the courts have to be vigilant when dealing with State funds and that it is the court's duty to oversee the payment of public funds. An applicant must prove its claim with reliable evidence and the court cannot allow that, when, on the face of it, the claim is based upon contradictory and flimsy evidence.

[18] *Mzwakhe* at para 6.

[67] On 8 May 2023, the SCA handed down judgment in *Road Accident Fund and others v Taylor and another*[19] *(Taylor)* where it found that *Maswanganyi* was wrong.

[68] In *Taylor*[20]*,* the SCA confirmed that:

> '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).'

[69] In my view, there is a distinction to be drawn between a case where the parties to the litigation have reached a compromise and approach the Court to make the settlement agreement an order of court and a case where the settlement agreement is disputed and the one party seeks for it to be made an order of court and the other party seeks for it to be set aside.

[70] In a case where the parties reached a compromise and approach the Court to make it an order of court, the court cannot *mero motu* play on oversight role. There is then no duty on the court to satisfy itself that the settlement agreement is not objectionable. This was confirmed in *Taylor:*[21]

> '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.'

[71] The situation is however different when the settlement agreement is disputed on the grounds that it would *inter alia* offend the public policy or is contrary to law or morality, or is improper and unconscionable. Although the Court has no

[19] 2023 JDR 1387 (SCA).
[20] Ibid at para 36.
[21] *Taylor* at para 51.

general duty or power to exercise oversight over the expenditure of public funds, the Court has such a duty when the issue has been raised and the Court has been mandated to decide the issue. In my view, this was accepted by the SCA in *Taylor,* where it was held that:[22]

> '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.'

[72] *In casu,* the Applicant has raised serious issues as to why the settlement agreement should not be made an order of Court.

[73] It was confirmed in *Taylor* that:[23]

> '[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

[22] Ibid at para 31.
[23] *Taylor* at paras 40 – 41.

> 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.'

[74] In my view, it would be contrary to public policy considerations to make the settlement agreement an order of Court. The Respondent pleaded guilty to serious misconduct, her conduct resulted in a huge financial loss of taxpayers' money and all indications are there that National Treasury and the Applicant have authorised the institution of legal proceedings against the Respondent to recover the money that was unlawfully invested with VBS.

[75] In view of the facts of this case, it would not serve the interest of justice to make the settlement agreement an order of Court as the payment of one year's salary to the Respondent, in circumstances where she acted unlawfully and in brazen disregard of the provisions of the MFMA, would offend the public policy.

[76] Enforcing the settlement agreement would constitute wasteful and irregular expenses on the part of the Municipality and will certainly send a wrong message. It is after all public funds, and in municipalities those funds should rather be used to render critical services to ratepayers. The discretion this Court has cannot be exercised in favour of making the settlement agreement an order of Court.

[77] The settlement agreement entered into between the parties in October 2020 is not made an order of Court.

Quo vadis?

[78] This leaves the application for review.

[79] In my view, the parties have settled the litigation in respect of the review application and it is not open for this Court to consider the application for review as that is no longer a *lis* that can be adjudicated.

[80] In *Cachalia v Harberer & Co,*[24] 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

[24] 1905 TS 457 at 464.

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 its 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.'

[81] The *lis* between the parties in respect of the review application had been fully and finally settled.

[82] In respect of the issue of cost, this Court has a broad discretion and in my view, the interest of justice would be best served by each party paying its own legal costs.

[83] In the premises, I make the following order:

Order

1. The Applicant's application to set aside the settlement agreement is dismissed;

2. The Second Respondent's application in terms of section 158(1)(c), to make the settlement agreement an order of court, is dismissed;

3. There is no order as to costs

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate U B Makuya with Advocate L M Magau
Instructed by:	Dabishi Nthambeleni Inc Attorneys
For the Second Respondent:	Mr M Mushwana of M Mushwana Inc Attorneys