

SOUTH AFRICA / JUDGMENT

Majope and Others v The Road Accident Fund (663/2022) [2023] ZASCA 145 (8 November 2023) [2023] ZASCA 145

COURT

Supreme Court of Appeal

BEFORE

Zondi, Dambuza, Carelse, Molefe, Nhlangulela

CASE / FILE NUMBER

663/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 663/2022

In the matter between:

TINA MAJOPE

FIRST APPELLANT

ABEDNEGO MACHABE

SECOND APPELLANT

FORTUNATE NWA-KHOSA NGOMANA THIRD

APPELLANT

PHATHUTSHEDZO TSHAVHUNGWE FOURTH

APPELLANT

and

THE ROAD ACCIDENT FUND

RESPONDENT

Neutral citation: Majope and Others v The Road Accident Fund (663/2022) [2023] ZASCA 145 (8 November 2023)

Coram: ZONDI, DAMBUZA, CARELSE AND MOLEFE JJA AND NHLANGULELA AJA

Heard: 29 August 2023

Delivered: 8 November 2023

Summary: Default judgment against the RAF – whether an attorney and client fee agreement should be incorporated in a court order –

a court is not entitled to make orders that were not sought.

ORDER

On appeal from: Mpumalanga High Court, Mbombela (Roelofse AJ, sitting as court of first instance):

1. In respect of both appeals, leave to intervene is granted to the first and second applicants as the third and fourth appellants with no order as to costs.
2. In respect of both appeals, the appeals are upheld with no order as to costs.
3. Under case number 308/2021, the order of the high court, is set aside and replaced with the following:

3.1. Judgment is granted in favour of the plaintiff as follows:

3.1.1. The defendant shall pay the plaintiff a sum of R661 795,00 in respect of plaintiff's claim for loss of earnings.

3.1.2. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs incurred up to the 22nd of March 2022.

3.1.3. The defendant is afforded 14 days from the date of this order or taxation to pay the capital amount and taxed or agreed costs.

3.1.4. The defendant shall not be liable for interest on the capital amount and/or costs if paid on time, failing which the defendant shall be liable for interest at the applicable legal rate from date of default to date of payment.

3.1.5. The above capital amount and costs shall be paid into the trust account of the plaintiff's attorneys of record.

4 Under case number 1309/2020, the order of the high court is set aside and replaced with the following:

4.1. Judgment is granted in favour of the plaintiff as follows:

4.1.1. The defendant shall pay the plaintiff a sum of R200 000,00 in respect of plaintiff's claim for loss of earnings:

4.1.2. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs incurred up to the 22nd of March 2022.

4.1.3. The defendant is afforded 14 days from the date of this order or taxation to make payment of the capital amount and taxed or agreed costs.

4.1.4. The defendant shall not be liable for interest on the capital amount and/or costs if paid on time, failing which the defendant shall be liable for interest at the applicable legal rate from date of default to date of payment.

4.1.5. The above capital amount and costs shall be paid into the trust account of the plaintiff's attorneys.

Carelse JA (Zondi, Dambuza and Molefe JJA and Nhlangulela AJA concurring):

- [1] This appeal is against the orders granted by the Mpumalanga Division of the High Court, Mbombela (Roelofse AJ) (high court) in an application for default judgment against the Road Accident Fund (RAF). Ms Majope, the first appellant and Mr Machabe, the second appellant, were plaintiffs in separate proceedings in the high court. In granting default judgment, the high court made additional unsolicited orders against Ms Majope, Mr Machabe and their legal representatives.
- [2] Subsequent to leave to appeal having been granted to Ms Majope and Mr Machabe by the high court, Ms Ngomana and Mr Tshavhungwe, their legal representatives, sought leave to intervene in the appeal in this Court, on the basis that the orders granted by the high court against them were not sought. The application for leave to intervene was not opposed. Since the legal representatives have a substantial interest in relation to the orders granted against them, leave to intervene in this appeal must be granted.

Background facts

- [3] The facts that gave rise to this appeal are the following. On 19 December 2019, Ms Majope was a passenger in a motor vehicle that collided with another vehicle on the R40, near Orpen, Acornhoek. On 1 February 2019, and at or near Burlington Main Road, Mpumalanga Province, Mr Machabe was injured when he fell off a moving bakkie in which he was a passenger. Both Ms Majope and Mr Machabe consulted with and mandated Ms Ngomana, to lodge claims against the RAF for damages they each had suffered as a result of the injuries they sustained in the accidents. On 20 February 2019 and 3 March 2020 they signed their respective attorney and own client fee agreements with Ms Ngomana. In due course Ms Ngomana instituted proceedings on behalf of Ms Majope and Mr Machabe against the RAF under case nos 308/2021 and 1309/2020 respectively.

[4] The RAF did not enter an appearance to defend in either case. On 19 October 2020, the RAF conceded liability for negligence in respect of Mr Machabe's claim and did the same on 14 December 2020 in respect of Ms Majope's claim. What remained in dispute was the quantum in respect of both claims. On 29 November 2021 the notices

setting both matters down for hearing on 22 March 2022 were delivered to the RAF.

Proceedings in the high court

[5] On the day of the hearing, there was no appearance on behalf of the RAF. Ms Ngomana and Mr Tshavhungwe as Counsel, appeared on behalf of Ms Majope and Mr Machabe. Ms Majope and Mr Machabe filed damages affidavits in support of their claims. After considering the various expert reports, the high court directed Ms Ngomana and Mr Tshavhungwe

to prepare draft orders. Both draft orders that were handed in proposed inter alia the following prayer:

'... 4.7 It is recorded that there is no contingency fee agreement'.^[1] (My underlining.)

[6] The proposed orders triggered an enquiry by the high court into whether Ms Majope and Mr Machabe were employed or not. The high court obviously did not believe that no contingency fee agreement had been concluded. What followed during the further proceedings was quite unusual. The high court referred the parties to the following passage in a judgment of that court, *Thobile Khethiwe Mucavele obo Mpho Siboniso Mucavele v The MEC of Health (Mucavele)*^[2] and directed Ms Ngomana to file affidavits:

'[16] Mindful of the Judgement of the Judge President of this Division in the matter of *Thobile Khethiwe Mucavele obo Mpho Siboniso Mucavele v The Mec of Health*, Case Number: 3352/2016 that was delivered 17 March 2022 ("Mucavele"), I directed Ms Ngomana to file an affidavit wherein she furnishes the court with answers to the following questions: (i) What fee was agreed upon?; (ii) When was such fee supposed to be paid?; what was the amount of fee agreed upon; (iv) if no fee was paid (or part thereof), when was the fee or remainder thereof to be paid?; (v) If no fee was paid, on what basis was it alleged that no contingency fee was agreed upon?; (vi) What was the agreement between attorney and counsel and when would counsel furnish his account, if any?'

[7] In *Mucavele* the court refused to make a settlement agreement concluded between the plaintiff and her legal representatives a court order because it was of the view that a fee agreement which they had concluded was a contingency fee agreement which did not comply with the provisions of the Contingency Fees Act 66 of 1997.

[8] Ms Ngomana responded by way of an affidavit in both cases. On 24 March 2022, Ms Ngomana and Mr Tshavhungwe appeared before the high court during a virtual hearing. The high court held an enquiry into whether the attorney and client fee agreement concluded with Ms Majope and Mr Machabe was not, in fact, a contingency fee agreement.

[9] At the hearing the following exchange ensued between the high court and the legal representatives:

‘COURT RESUMES

...

COURT: ... Alright. Now you filed Ms Ngomana you filed affidavit in response to the questions.

MS NGOMANA: That is correct My Lord.

COURT: Alright. And the affidavit I have in front of me in respect of the Majope matter and it was on the 22nd of March it was commissioned. Alright. Now what fee was agreed upon? I requested you to furnish me with answers to these questions.

And in paragraph 2 of the affidavit you say that I confirm that I have entered into attorney and own client fee agreement in respect of which...was entered and signed on 3 March 2020. So was there a written agreement?

COURT: And where is a copy of that agreement?

MS NGOMANA: We have it in the file My Lord.

COURT: Oh. Okay. So there is a written agreement and you have a copy of that?

COURT: Alright, what fee was agreed upon? Attorney and own client fee agreement, that was your answer. Is that correct?

COURT: When was such fees supposed to be paid when the matter was finalised?

COURT: Alright. Now tell me what would have happened if the matter was finalised, but there would be no – the judgment would not be in favour of the plaintiff? So the claim would be dismissed with costs. What would be the position when with regards to the – when the fee had to be paid upon finalisation?

MR TSHAVHUNGWE: My Lord, just to, just I think I missed one little point.

COURT: Yes

MR TSHAVHUNGWE: Why I personally prepared a draft order with that provision. I think my attorney will also furnish copies of some of the agreements and offers that came directly from the fund.

MR TSHAVHUNGWE: They come directly to stipulate that no payment will be made unless a contingency fee agreement is furnished. And wherein, wherein an order is made that there is no contingency fee agreement and it truly reflects, it does not delay the payment of those fees. And hence I have included same on the order. And in the division where I also practice and where I practice for a very long time, in the Gauteng Division, it was a directive that where there is no contingency fee agreement, it should be reflected on the draft order. And I think I also adapt the practice from the Gauteng Division.’

[10] On 26 May 2022, the high court delivered judgment and granted the following order:

‘[54] In the premises, I made the following order:

- (a) Judgment is granted in favour of the plaintiff in case number: 308/2021;
- (b) The defendant is ordered to pay the plaintiff in case number: 308/2021 an amount of R661 795.00 together with interest at the prescribed rate calculated from the date of this judgment to the date of payment, both days included;
- (c) Judgment is granted in favour of the plaintiff in case number 1309/20;
- (d) The defendant is ordered to pay the plaintiff in case number:1309/20 an amount of R200 000.00 together with interest at the prescribed rate calculated from the date of this judgment to the date of payment, both days included;
- (e) Ngomana and Associates shall not recover any disbursements or fees from the plaintiffs;
- (f) Ngomana and Associates are directed to furnish a copy of this judgment to the plaintiffs within 5 (FIVE) days of this order and to file an affidavit with this court that it has done so;
- (g) The Registrar of this court is directed to forward a copy of this judgment to:
 - (i) The National Office of the Legal Practice Council;
 - (ii) The Mpumalanga Office of the Legal Practice Council; and
 - (iii) The Chief Executive Officer of the Road Accident Fund;
- (h) The Director of the Mpumalanga Office of the Legal Practice Council is directed to:
 - (i) Nominate a firm of attorneys to be appointed by this court for purposes of receiving the moneys due and payable by the defendant to the plaintiffs (“the nominated attorneys”);
 - (ii) Within 10 (TEN) days of this order inform the Registrar of this court of its nomination in paragraph (i) above;
- (i) The Registrar shall enrol case numbers 308/2021 and 1309/20 upon the unopposed motion roll for the court to consider the appointment of nominated attorneys;
- (j) Upon appointment of the nominated attorneys (if the court is satisfied with the nomination), the defendant is directed to pay the amounts awarded to the plaintiffs into the trust account of the nominated attorneys within 30 (THIRTY) days of this order;
- (k) The nominated attorneys are directed to pay to the plaintiffs the amounts received on the plaintiff’s behalf after the deduction of their taxed fees for the execution of their appointment;

- (l) The Legal Practice Council is hereby directed to investigate and consider whether the conduct of Ms Ngomane and Advocate Tshavhungwe offended the provisions of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (Government Gazette No. 42337).’

[11]

Orders

- (e) to (l) were never sought by any of the parties. Neither were they canvassed with Ms Ngomana and Mr Tshavhungwe before they were made. They are therefore not competent. Evidently, these orders were premised on a finding by the high court that the fee agreement concluded between Ms Majope and Mr Machabe with Ms Ngomana was a contingency mandate which was invalid because of non-compliance with certain provisions of the Contingency Fees Act. The high court was of the view that because of the non-compliance, Ms Ngomana was not entitled to any fees in respect of the services she had rendered to Ms Majope and Mr Machabe. Furthermore, the RAF had no obligation to pay any costs to her. The effect of these orders was to deprive Ms Ngomana and Mr Tshavhungwe of their right to claim fees for the services they had rendered to Ms Majope and Mr Machabe without affording them the opportunity to be heard before the orders were made. Not only were Ms Ngomana and Mr Tshavhungwe deprived of their right to claim their fees but Ms Majope and Mr Machabe were also deprived of their right to recover their costs from the RAF. Even if the fee structure agreement was an agreement that was hit by the Contingency Fees Act as the high court found, that in itself was not a proper basis to deprive Ms Ngomana and Mr Tshavhungwe of the right to recover their fees for the services they had rendered to Ms Majope and Mr Machabe.[3] It is particularly concerning that these extraordinary orders were made against Ms Ngomana and Mr Tshavhungwe, when they were not

parties to the case before the high court.

- [12] As stated earlier the contested orders resulted from the high court’s findings that the agreement concluded between Ms Majope, Mr Machabe and Ms Ngomana was in fact a contingency fee agreement which did not comply with the Contingency Fees Act. The high court erred in this regard. A fee agreement is in essence a contract between an attorney and client to arrange for payments outside the prescribed tariff. To delegitimise such agreements erodes a basic principle of our law of contract. This Court in *Road Accident Fund v MKM obo KM and Another*; *Road Accident Fund v NM obo CM and Another*[4] dealt with the subject of contingency fee agreements; this and it held that:

‘It must be borne in mind that a contingency fees agreement is a bilateral agreement between a legal practitioner and his or her

client. It has nothing to do with a party against whom the client has a claim – the RAF in this instance.’[5]

In this case Ms Ngomana and her clients entered into an attorney and client agreement and there is no reason why the same principle should not apply.

[13] In *Road Accident Fund v Taylor and other matters*[6] this Court held:

‘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 . . .’[7] (My underlining.)

The fee agreement between Ms Majope, Mr Machabe and Ms Ngomana is not related to the litigation and should not have been included in the draft order, to be made an order of court. Such an agreement does not require judicial approval as is the case where parties have entered into contingency fee agreements which require judicial oversight. It is open to Ms Majope and Mr Machabe to request that the attorney and client fee agreement should be submitted to the Taxing Master for taxation should they wish to do so.

[14] In conclusion, I find that the high court materially misdirected itself when it made orders that were not sought by the parties.

[15] In the result, the following order is made:

1. In respect of both appeals, leave to intervene is granted to the first and second applicants as the third and fourth appellants with no order as to costs.
2. In respect of both appeals, the appeals are upheld with no order as to costs.
3. Under case number 308/2021, the order of the high court, is set aside and replaced with the following:

3.1. Judgment is granted in favour of the plaintiff as follows:

3.1.1. The defendant shall pay the plaintiff a sum of R661 795,00 in respect of plaintiff’s claim for loss of earnings.

3.1.2. The defendant is ordered to pay the plaintiff’s taxed or agreed party and party costs incurred up to the 22nd of March 2022.

3.1.3. The defendant is afforded 14 days from the date of this order or taxation to pay the capital amount and taxed or agreed costs.

3.1.4. The defendant shall not be liable for interest on the capital amount and/or costs if paid on time, failing which the defendant shall be liable for interest at the applicable legal rate from date of default to date of payment.

3.1.5. The above capital amount and costs shall be paid into the trust account of the plaintiff’s attorneys of record.

4. Under case number 1309/2020, the order of the high court is set aside and replaced with the following:

4.1. Judgment is granted in favour of the plaintiff as follows:

4.1.1. The defendant shall pay the plaintiff a sum of R200 000,00 in respect of plaintiff's claim for loss of earnings:

4.1.2. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs incurred up to the 22nd of March 2022.

4.1.3. The defendant is afforded 14 days from the date of this order or taxation to make payment of the capital amount and taxed or agreed costs.

4.1.4. The defendant shall not be liable for interest on the capital amount and/or costs if paid on time, failing which the defendant shall be liable for interest at the applicable legal rate from date of default to date of payment.

4.1.5. The above capital amount and costs shall be paid into the trust account of the plaintiff's attorneys.

Z CARELSE

JUDGE OF APPEAL

Appearances

For applicants: Phathusthedzo Tshavhungwe Instructed by: Ngomana & Associates Attorneys, Nelspruit Phatshoane Henney Incorporated, Bloemfontein

[1] Under case number 308/21 (the first appellant) the draft order reads: '4. order sought 4.1. The Defendant shall pay the Plaintiff a sum of R 661 795,00 (SIX HUNDRED AND SIXTY ONE THOUSAND AND SEVEN HUNDRED AND NINETY FIVE RANDS) in respect of Plaintiff's claim for Loss of earnings: 4.2. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs up to the 22nd of March 2022. The aforementioned costs shall include the reasonable disbursements and costs of counsel. Which costs shall be within the discretion of the taxing master. 4.3. In the event that the costs are not agreed on, The Plaintiff shall serve the notice of taxation to the defendant's attorney of record. 4.4. The Defendant is afforded 14 (fourteen) court days to make payment of the capital amount and taxed or agreed costs. 4.5. The Defendant shall not be liable for interest on the capital amount and/or costs if paid in time, failing which the defendant will be liable for interest at 7% from date of this order or for allocator to date of payment. 4.6. The above capital amount and costs shall be paid to the plaintiff's attorneys of record trust account. 4.7. It is recorded that there is no contingency fee Under case number 1309/2021 (the second appellant) the draft order reads: '4.1. The Defendant shall pay the Plaintiff a sum of R334 800,00 (THREE HUNDRED AND THIRTY-FOUR THOUSAND AND EIGHT HUNDRED RANDS) in respect of Plaintiffs claim for Loss of earnings: 4.2. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs of up to the 22nd of March 2022. The aforementioned costs shall include the reasonable disbursements and costs of counsel. Which costs shall be within the discretion of the taxing master. 4.3. in the event that the costs are not agreed on.

The Plaintiff shall serve the notice of taxation to the defendant's attorney of record. 4.4. The Defendant is afforded 14 (fourteen) court days to make payment of the capital amount and Taxed or agreed costs. 4.5. The Defendant shall not be liable for interest on the capital amount and/or costs if paid in time, failing which the defendant will be liable for interest at 7% from date of this order or for allocator to date of payment. 4.6. The above capital amount and costs shall be paid to the plaintiff's attorneys of record trust account. 4.7. It is recorded that there is no contingency fee agreement.'

[1] Under case number 308/21(the first appellant) the draft order reads:

'4. order sought

4.1. The Defendant shall pay the Plaintiff a sum of R 661 795,00 (SIX HUNDRED AND SIXTY ONE THOUSAND AND SEVEN HUNDRED AND NINETY FIVE RANDS) in respect of Plaintiff's claim for Loss of earnings:

4.2. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs up to the 22nd of March 2022. The aforementioned costs shall include the reasonable disbursements and costs of counsel. Which costs shall be within the discretion of the taxing master.

4.3. In the event that the costs are not agreed on, The Plaintiff shall serve the notice of taxation to the defendant's attorney of record.

4.4. The Defendant is afforded 14 (fourteen) court days to make payment of the capital amount and taxed or agreed costs.

4.5. The Defendant shall not be liable for interest on the capital amount and/or costs if paid in time, failing which the defendant will be liable for interest at 7% from date of this order or for allocator to date of payment.

4.6. The above capital amount and costs shall be paid to the plaintiff's attorneys of record trust account.

4.7. It is recorded that there is no contingency fee

Under case number 1309/2021 (the second appellant) the draft order reads:

'4.1. The Defendant shall pay the Plaintiff a sum of R334 800,00 (THREE HUNDRED AND THIRTY-FOUR THOUSAND AND EIGHT HUNDRED RANDS) in respect of Plaintiffs claim for Loss of earnings:

4.2. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs of up to the 22nd of March 2022. The aforementioned costs shall include the reasonable disbursements and costs of counsel. Which costs shall be within the discretion of the taxing master.

4.3. in the event that the costs are not agreed on. The Plaintiff shall serve the notice of taxation to the defendant's attorney of record.

4.4. The Defendant is afforded 14 (fourteen) court days to make payment of the capital amount and Taxed or agreed costs.

4.5. The Defendant shall not be liable for interest on the capital amount and/or costs if paid in time, failing which the defendant will be liable for interest at 7% from date of this order or for allocator to date of payment.

4.7. It is recorded that there is no contingency fee agreement.'

[2] Thobile Khethiwe Mucavele obo Mpho Siboniso Mucavele v The MEC of Health [2022] ZAMPMBHC 33.

[3] Mkuyana v Road Accident Fund [2020] ZAECGHC 73; [2020] 3 All SA 834 (ECG); 2020 (6) SA 405 (ECG) para 51.

[4] Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another [2023] ZASCA 50; [2023] 2 All SA 613 (SCA); 2023 (4) SA 516 (SCA).

[5] Ibid para 27.

[6] Road Accident Fund v Taylor and other matters

[2023] ZASCA 64; 2023 (5) SA 147 (SCA).

[7] Ibid para 41.

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