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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 140/2017

In the matter between:

ADV A J DU TOIT NO obo NTSIKELELO MAFANYA **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Adv A J du Toit N O obo Ntsikelelo Mafanya v Road Accident Fund* (140/2017) [2018] ZASCA 42 (28March 2018)

Coram: Maya P and Saldulker, Swain and Dambuza JJA and Makgoka AJA

Heard: 16 March 2018

Delivered: 28 March 2018

Summary: Road Accident Fund: liability to claimant settled by agreement: curator ad litem appointed to claimant: application by curator ad litem to set aside agreement of settlement: claimant allegedly lacking mental capacity at the time of the conclusion of the agreement: failure by curator ad litem to discharge onus: appeal dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Bozalek, Fortuin and Dolamo JJ sitting as court of appeal):

The appeal is dismissed with no order as to costs.

JUDGMENT

Saldulker JA (Maya P and Swain and Dambuza JJA and Makgoka AJA concurring):

[1] This appeal is against the judgment of the full court of the Western Cape Division, Cape Town (Bozalek, Fortuin and Dolamo JJ). The full court dismissed an appeal from the court of first instance (Manca AJ) which had refused an application by the appellant, Adv Du Toit N O, in his capacity as the curator ad litem to Mr Ntsikelelo Mafanya, the patient. The appeal is with the special leave of this court.

[2] The appellant sought an order setting aside a settlement agreement concluded between Mr Mafanya and the respondent, the Road Accident Fund (RAF), in respect of the issue of liability (the merits), in a damages claim instituted by Mr Mafanya against the RAF for bodily injuries sustained by him in a motor vehicle collision. The appellant alleged that Mr Mafanya lacked the requisite mental capacity and was therefore incapable of providing his legal representatives with valid instructions pertaining to the conclusion of the settlement agreement, the terms of the settlement having been made an order of court on 23 October 2009. I turn to consider, briefly, the facts, giving rise to this appeal.

[3] On 19 November 2003, Mr Mafanya was involved in a motor vehicle collision. He was a passenger in one of the two vehicles that collided. He sustained serious bodily injuries, including a head injury as a result of which he was hospitalised for three weeks, followed by treatment and further hospitalisation. Pursuant to the collision, Mr Mafanya instructed DSC attorneys to act on his behalf in connection with his claim for damages, and signed a power of attorney during October 2004, authorising them to settle his claim and to make any payments or receive any compensation on his behalf. A claim was duly lodged with the RAF on his behalf. Following the expiry of the statutory lodgement period in terms of the Road Accident Fund Act 56 of 1996, a summons was served on the RAF commencing action and a trial date was allocated for 15 October 2009. On 23 October 2009 the issue on the merits was finalised and an agreement of settlement was concluded in which the RAF agreed to compensate Mr Mafanya to the extent of 20 per cent of any damages he may subsequently prove to have suffered.

[4] During August 2014, after the lapse of five years, Mr Mafanya's wife, Mrs Nomaxabiso Queenie Mafanya, launched an application for the appointment of the appellant as curator ad litem to assist Mr Mafanya, with the institution and prosecution of his claim for damages against the RAF. The application was supported by the affidavits of three experts, Dr Johan Reid, a neurologist, Prof T Zabow, a psychiatrist and Ms M Coetzee, a neuro-clinical psychologist, all of whom recommended that a curator ad litem be appointed to Mr Mafanya.

[5] In November 2014, the appellant, represented by DSC Attorneys (the same attorneys who represented Mr Mafanya from 2004 to date), and relying

upon the same affidavits and reports of Dr Reid, Prof Zabow and Ms Coetzee, which were previously utilised in the application for the appointment of the curator ad litem, launched an application to set aside the settlement agreement concluded between Mr Mafanya and the RAF, the subject matter of this appeal. The matter came before Manca AJ, who dismissed the application on the basis that the appellant had not established on a balance of probabilities that Mr Mafanya lacked the necessary mental capacity to give instructions to DSC attorneys, to conclude the agreement of settlement.

[6] On appeal to the full court, Bozalek J similarly held that the onus of proving that Mr Mafanya lacked the necessary capacity to either give instructions for the acceptance of the settlement agreement or to furnish a valid power of attorney to his legal representatives at the relevant time had to be discharged by the appellant. The full court meticulously analysed the expert reports and reasoned that '[a]t best this issue could only be addressed using these medical reports by way of inferential reasoning', as none of the medical experts directly addressed this issue. In this regard the full court succinctly said: '[e]ven on this basis there is no room to conclude that the most probable inference to be drawn from them and from the affidavits of the experts is that at the relevant time [Mr Mafanya] lacked legal capacity by reason of the sequelae to his head injury'.

[7] On appeal before us, counsel for the appellant contended that the full court failed to properly analyse the evidence of the three experts and that this evidence proved on a balance of probabilities that Mr Mafanya had exhibited symptoms indicative of an impaired mental capacity, on his discharge from hospital, which were permanent and presently evident. According to the appellant this justified the conclusion that Mr Mafanya did not have the necessary mental capacity to

provide his legal representatives with valid instructions at the time the settlement was concluded in October 2009.

[8] It is not necessary to traverse in great detail the experts' reports and their findings as the full court has already done so, except in so far as it is relevant to the central issue of Mr Mafanya's mental capacity to provide his attorneys with valid instructions pertaining to the settlement in October 2009. I turn to consider these reports which have been substantially redacted in the interests of brevity.

[9] The appellant placed considerable reliance on Prof T Zabow's affidavit. On 3 July 2014, Prof Zabow consulted with Mr Mafanya and opined that he had on discharge from the hospital exhibited changed behaviour with disinhibition, irritability, moodiness and impulsivity, which behavioural symptoms had persisted. In particular Prof Zabow stated that Mr Mafanya's memory function was defective, he showed poor insight and lacked judgmental capacity. He stated that Mr Mafanya had suffered brain damage with cognitive and behavioural symptoms which were permanent and which required management, psychiatric care and supervision, and that due to this defective functioning level secondary to a head injury, he was unable to manage his own affairs. This conclusion is startling, and must be viewed in context. Prof Zabow only consulted with Mr Mafanya on 3 July 2014, more than ten years after the collision, and five years after the settlement was concluded in October 2009. Prof Zabow laid no basis and advanced no reasons to justify his conclusion ten years later, that the mental deficits of the patient as he described them, were in fact present and had persisted on Mr Mafanya's discharge from hospital.

[10] Ms Coetzee, interviewed Mr Mafanya on 7 September 2009, approximately a month and a half before the settlement agreement was concluded on 23 October 2009 between Mr Mafanya and the RAF, and thereafter four years later, on 19 September 2013, Ms Coetzee furnished one report dated 17June 2014. She conducted a range of neuro-psychological tests and assessments, and raised concerns about Mr Mafanya's short term memory, slow communication skills and an 'unmistakeable drop' [i]n [Mr Mafanya's] level of functioning. She opined that 'in the absence of an alternative explanation, one simply cannot rule out the possibility that a more significant head injury or even a secondary brain insult associated with multiple orthopaedic fractures, had occurred and compromised his neuro-psychological functioning. Ms Coetzee also reported on collateral information that she had received from Mr Mafanya's wife in September 2009, that he was forgetful and that he had to make written notes to remind himself of certain things. She indicated that Mr Mafanya was suffering from a major depressive disorder of moderate degree which had persisted for several years, and that given his neuro-cognitive deficits and his executive and memory difficulties, Mr Mafanya required a curator ad litem to assist him. However, at no stage during any of these two assessments did Ms Coetzee suggest that Mr Mafanya lacked the requisite mental capacity. Nor did she express an opinion on whether Mr Mafanya required a curator ad litem when she first examined him on 7 September 2009, which was approximately six weeks before the settlement agreement was concluded on 23 October 2009.

[11] Dr Reid, examined Mr Mafanya on 25 March 2014. He indicated that there was no evidence of a significant brain injury and that no neuro-cognitive change was expected after such an injury. Dr Reid indicated that the reported subjective impairment in memory related to ongoing post-traumatic depression as a result of polytrauma and residual orthopaedic deficits. He expressed no opinion on

whether a curator ad litem should be appointed for Mr Mafanya when he examined Mr Mafanya in March 2014, nor did he raise any concerns regarding Mr Mafanya's mental capacity.

[12] Regrettably none of the medical experts directly expressed an opinion in their affidavits or reports that Mr Mafanya lacked the requisite mental capacity when the settlement agreement was concluded in 2009, thereby being unable to give proper instructions to his attorneys. There is no reason to believe that all the medical experts would not have been able to recognise and evaluate whether Mr Mafanya lacked the necessary mental capacity during their interactions with him. In the event, the appellant was unable to establish that Mr Mafanya lacked the requisite mental capacity, which was further exacerbated by the fact that the medical evidence did not support this conclusion either. Furthermore, no oral evidence was led to support the submission that Mr Mafanya lacked the necessary mental capacity nor was it considered, according to counsel for the appellant.

[13] I accordingly agree with the conclusion of the full court that the most probable inference to be drawn from the evidence of the experts is that, at the relevant time Mr Mafanya did not lack the requisite mental capacity. I am fortified in this conclusion by the following considerations which fall to be added: Mr Mafanya was able to give a coherent account of the collision to the police on 28 January 2004; he signed a power of attorney on 24 October 2004; he provided the details used to complete the RAF1 claim form which was signed on 18 November 2005; he signed an affidavit on 19 April 2006 in compliance with s 19*(f)* of the RAF Act, setting out details of the collision; he gave a coherent

account to the experts who examined him during the period between June 2009 and July 2014 for the purposes of the merits of the trial.

[14] The full court in a carefully reasoned judgment, properly evaluated the evidence before it, and cannot be faulted for arriving at the conclusion that the appellant failed to prove on a balance of probabilities that the patient lacked the necessary mental capacity at the relevant time of the conclusion of the settlement agreement. I agree with the finding of the full court that a significant factor is the complete lack of evidence from DSC Attorneys, the legal representatives of Mr Mafanya. They must have conveyed the terms of the proposed settlement to him, and obtained instructions from him to settle his claim on the terms set out in the agreement. If they had experienced any difficulty in obtaining instructions from him, his mental state should immediately have been determined. The settlement agreement should not have been concluded and a curator ad litem should have been appointed immediately, and not five years later. As the full court stoically observed: 'It is possible that the failure by DSC Attorneys to file an explanatory affidavit in this application may well have been due to the fact that they found themselves on the horns of a dilemma: namely, either admitting that they settled a claim on behalf of a client without disclosing that he lacked legal capacity or that they negligently failed to realise that he lacked such capacity. Whatever the true position may be, the failure by the attorneys to depose to an affidavit inevitably has adverse implications for the appellant's case'.

[15] In my view there is a further possible explanation; which is that DSC Attorneys justifiably had no reason to believe that Mr Mafanya lacked the necessary mental capacity when the power of attorney was signed in 2004, or when the agreement of settlement was concluded in October 2009. In the

absence of an explanation by the attorneys, one is left to speculate which is detrimental to Mr Mafanya's case. A further disconcerting feature of this case is that DSC Attorneys are also representing the appellant. As observed by the full court, there is at least a potential conflict of interest given the circumstances of this case, and that it would have been preferable to have independent attorneys represent the appellant.

[16] As far as costs are concerned, both counsel conceded that an order for costs against Mr Mafanya would not be appropriate given the circumstances of this case. The legal representatives of the appellant including the curator ad litem, appeared pro bono in this appeal, and the RAF does not seek a costs order against Mr Mafanya. In the circumstances, it is just and equitable that no order as to costs be made.

[17] The appeal must accordingly fail and the following order is made:

The appeal is dismissed with no order as to costs.

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H K Saldulker

Judge of Appeal

Appearances

For Appellant:	A Laubscher and S Dzakwa Instructed by: DSC Attorneys, Cape Town Rosendorff and Reitz Barry, Bloemfontein
For Respondent:	D Potgieter SC Instructed by: Z Abdurahman Attorneys, Cape Town Maduba Attorneys, Bloemfontein