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22/05/2023

TO:

1. **Judges - Gauteng Division of the High Court, Pretoria and Johannesburg**
2. **Chief Registrar - Gauteng Division of the High Court, Pretoria and Johannesburg**
3. **Secretariat – Judicial Case Flow Management, Office of the Chief Justice**
4. **Registrars - Gauteng Division of the High Court, Johannesburg and Pretoria**
5. **Legal Practice Council – Gauteng**
6. **Law Society of South Africa**
7. **Gauteng Family Law Forum**
8. **Gauteng Attorneys Association**
9. **Pretoria Attorneys Association**
10. **Johannesburg Attorneys Association**
11. **West Rand Attorneys Association**
12. **South African Black Women in Law**
13. **National Association of Democratic Lawyers**
14. **Black Lawyers Association**
15. **South African Women Lawyers Association**
16. **South African Medical Malpractice Lawyers Association**
17. **Personal Injury Plaintiff Lawyers Association**
18. **South African Medico-Legal Association**
19. **Office of the Director of Public Prosecutions, Pretoria and Johannesburg**
20. **Office of the State Attorneys, Pretoria and Johannesburg**
21. **Solicitor General**
22. **Office of the Family Advocate, Pretoria and Johannesburg**
23. **Legal Aid South Africa**
24. **Johannesburg Society of Advocates**
25. **Pretoria Society of Advocates**
26. **Gauteng Society of Advocates**
27. **Tshwane Society of Advocates**
28. **Pan African Bar Association of South Africa**

29. **General Council of the Bar of South Africa**
30. **National Bar Council of South Africa**
31. **South African Bar Association**
32. **National Forum of Advocates**
33. **North Gauteng Association of Advocates**
34. **Church Square Association of Advocates**
35. **Advocates for Transformation**
36. **Legal Division of the Department of Health: Gauteng**
37. **Legal Division of the Department of Sport, Arts, Culture and Recreation**
38. **Gauteng Department of Agriculture and Rural Development**
39. **Legal Services - Gauteng Provincial Department of Education**
40. **South African Board for Sheriffs**
41. **South African Sheriff Society**
42. **RAF**

Dear Sir / Madam

IN RE:

REVISIONS TO THE SEVERAL DIRECTIVES DEALING WITH SETTLEMENT AGREEMENTS

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1. Settlement agreements in respect of damages claims in which public money is disbursed are regulated in terms of the Judge President's Directive 1 of 2021 (as amended). Chapter 9, paras 46 – 58 sets out a regimen which requires a Judge before whom an application is brought to make a settlement agreement an order of court to interrogate the agreement for propriety and rationality in relation to the relevant facts and in relation to the integrity of the agreement. Chapter 9, in this context, directs practitioners to present written submissions motivating the propriety of the agreement.

2. This protocol for examining a settlement agreement is premised on several policy considerations. Principally, it is informed by an awareness of some settlement agreements being presented to a court, where public moneys are to be disbursed, especially involving the Road Accident Fund, which are prima facie inexplicable and ostensibly unmeritorious. The risk exists of a judge becoming an unwitting accomplice to unethical, and perhaps unlawful, settlements arising from either collusion between the representatives of the parties or the

plaintiff's representative taking undue advantage of the incompetence of the defendant's representative. The idea that it is proper for a court to *mero motu* audit settlements derived support from the decision in the SCA in *Maswanganyi v RAF 2019 (5) SA 407 (SCA).* The majority in that case held that there was a duty on a court to 'ensure that they do not grant orders that are *contra bonos mores*'. (at para 32). Further, it was held that a court is not a rubber stamp. (at para 33). The granting of an order making an agreement an order of court was held to be the exercise of a discretion. At para 57 - 58 it was held:

"[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. 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 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."

3. On Monday 8 May 2023, the SCA delivered judgment in *Road Accident Fund v Taylor and other Matters [2023] ZASCA 64.* (The Taylor case)

4. The *Taylor case* held that the *Maswanganyi case* was clearly wrong. Furthermore, the *Taylor case* held that, to the extent that chapter 9 of the Directive contradicts the judgment in the *Taylor case*, it is invalid.

5. The critical import of the *Taylor case* is that a court has no general power to interrogate a settlement agreement. The critical findings in the *Taylor Case,* as far as they are relevant to the practice of this Division, are thus:

[31] 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. ….

[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 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.

[42] The relevant issue in Eke v Parsons was whether a settlement agreement that had been made an order of court, was final in its terms and whether the other party was entitled to approach a court for the enforcement of the order in accordance with the procedure set out therein. The Constitutional Court therefore did not consider the nature and effect of a compromise and did not bring about any change to the law in that regard. Importantly, however, the judgment makes clear (paras 8, 19-24 and 27- 28) that the power to make a compromise an order of court, is derived from a longstanding practice aimed at assisting the parties to give effect to their compromise. The clear import of Eke v Parsons therefore is that this power is not derived from the jurisdiction of the court over the issues that had been raised before it, but were subsequently settled. In making a compromise an order of court, the court plainly does not determine the issues that the compromise settled. Unless a compromise is conditional upon it being made an order of court, the fact that a court declines to do so, in itself, has no effect on the enforceability of the compromise inter parties.

[50] The court a quo referred to a practice directive that had been issued on 2 October 2019, which appears to run contrary to this judgment, in that it provides for a judge to ‘interrogate’ the circumstances under which a settlement agreement was entered into. The meaning of the portion of the practice directive, as quoted in the judgment of the court a quo, is quite unclear.

As we have insufficient evidence in respect of its status, scope of application and context, I am loath to express a firm view on this practice directive. It suffices to say that to the extent that this (or any other) practice directive is in conflict with this judgment, it is invalid. See Mhlongo and Others v Mokoena NO and Others [2022] ZASCA 78; 2022 (6) SA 129 (SCA) para 14.

[51] 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.

6. If follows from the *Taylor case* that if the courts are not empowered to play a role in the safeguarding of public money by a *mero motu* integrity audit, as described above, the practice that has been followed in this Division concerning Settlement agreements involving public money must be changed. It is no longer open to a court to enquire into whether or not the settlement agreement constitutes the fruits of impropriety.

7. Accordingly, with immediate effect the following changes to the Directives are effected:

8. Directive 1 of 2021:

   The heading of chapter 9 and the provisions of paras 46 – 58 are deleted.

   In substitution is the following:

   New heading:

   SETTLEMENT/CONSENT ORDERS

   New Para 46:

   Matters in which the parties seek a settlement agreement to be made an order of court should be enrolled on the general civil trial roll,

   New Para 47:

   The Judge presiding in a court before whom such a matter is brought shall, in keeping with section 173 of the Constitution, exercise a discretion whether or not to grant such an order.

9. Directive 2 of 2022:

9.1. Para 78 – the provisions are deleted, and the following is substituted:

'*A matter before the general civil trial court which becomes settled and the parties seek that the agreement be made an order of court shall be dealt with in the that court*.'

9.2. Paras 70, 80 and 83: – these provisions shall apply for the remainder of term 2 of 2023; from term 3 of 2023, all such cases must be enrolled on the general civil trial roll.

9.3. Para 84: – these provisions shall apply for the remainder of term 2 of 2023; from term 3 of 2023, Para 84.1 and 84.2 are deleted and applications for settlement agreements to be made orders of court shall be dealt with on the general civil trial roll.

9.4. Para 92: – these provisions shall remain for the rest of term 2 of 2023, and from the beginning of term 3 of 2023 they are deleted.

10. <u>Directive of 17 February 2021:</u>

10.1. This Directive deals with orders of court required for the taxation of costs.

10.2. Paras 3 and 4 are deleted.

10.3. The attention of practitioners is drawn to the provisions of section 4 in the *Contingency Fees Act 66 of 1997* to which adherence must be given.

'4 Settlement

(1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating-

a. the full terms of the settlement;
b. an estimate of the amount or other relief that may be obtained by taking the matter to trial;
c. an estimate of the chances of success or failure at trial;
d. an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;
e. the reasons why the settlement is recommended;
f. that the matters contemplated in paragraphs *(a)* to *(e)* were explained to the client, and the steps taken to ensure that the client understands the explanation; and

g. that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating-

a. that he or she was notified in writing of the terms of the settlement;
b. that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and
c. his or her attitude to the settlement.

(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.'

11. Matters which are settled and, as stipulated by section 4(1) and (5), cited above, <u>are not before the court,</u> should not be enrolled, but instead be referred to the Legal Practice Council (LPC) in terms of rule 5 of the Rules made by the LPC in GG42739 of 4 October 2019.

12. It should be furthermore noted that in all <u>default judgment matters</u> in which damages need to be proven, it shall continue to be necessary to present evidence, either on affidavit or viva voce, as is appropriate to the nature of the evidence, as stipulated in paras 82 and 86 of Directive 2 of 2022.

Sincerely

D MLAMBO
JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA
Electronically submitted therefore unsigned