REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 2010/17220

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

8/12/12 .....

In the matter between

MOTSWAI, MUSEJIE VENNON **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

Neutral citation: *Motswai v RAF* 2012 SA (GSJ)

Coram: SATCHWELL J

Heard: 15th November 2012

Delivered: 7th December 2012

Summary: 1. The system of road accident compensation is intended to form an integral part of a system of social security to provide protection for members of society who have suffered misfortune. Instead the current practice of road accident compensation is both perceived by and utilised as a means of providing a livelihood for administrators, attorneys, advocates and professional experts. The claim and litigation in this matter has been for the sole benefit and enrichment of 'facilitators' of access to road accident compensation.

2. There never was and remains no merit in the supposed quantum of the claim for the Plaintiff; the matter was settled without any payment of any compensation to him for any supposed damages. Settlement only took place on the day set down for trial within the doors of the court. The only issue was to ensure payment of costs of the Plaintiff's attorney and Defendant's administrators and attorney, Plaintiff's counsel and Defendant's counsel, Plaintiff's medical and other 'experts' and Defendant's medical and other 'experts'. In short, no quantifiable damages or loss was ever sustained as a result of a road accident but costs have been incurred for the benefit of all those who feed off road accident victims.

3. There never was any 'serious injury' sustained by this road accident victim. Nevertheless the attorney litigated for general damages. The attorney signed particulars of claim founded upon an injury which the hospital records clearly indicated had never existed and had been excluded by hospital investigation. This was dishonest litigation.

4. The attorney signed the particulars of claim on the basis that he or she was *"admitted to appear in the High Court of South Africa in terms of Section 4(2) of the Right of Appearance in Courts Act 62 of 1995*". An officer of the court knowingly prepared a court document containing untruths which untruths were material to that court document. The requirement of signature of particulars of claim reflects its importance. That the signatory must either be an advocate or an attorney with a certain degree of expertise highlights the value to be ascribed to the signature. By appending one's signature to a pleading, the attorney or advocate confirms that he/she has been scrupulous in preparing the pleading.

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. I spent three and a half years of my life considering the principles and practice of road accident compensation both in South Africa and throughout the world.[1] During that time I learnt that any system of road accident compensation is intended to form an integral part of a system of social security[2] and, as such, is intended to provide protection for members of society who have suffered misfortune.[3] However, I also learnt that the current system of road accident compensation is both perceived by and utilised as a means of providing a livelihood for administrators, attorneys, advocates and professional experts employed both by the Road Accident Fund (RAF) and road accident victims.

2. This judgment is concerned with one such example of litigation for the sole benefit of and enrichment of those 'facilitators' of access to road accident compensation whom I have heard one judge describe as 'carnivorous' and whom I would describe as 'predatory'.

3. Litigation was instituted on behalf of a so-called victim of a road accident. There never was and remains no merit in the supposed quantum of his claim. The matter was settled without any payment of any compensation for any supposed damages. However, settlement only took place on the day set down for trial within the doors of the court. The result is that the costs of the Plaintiff's attorney and Defendant's administrators and attorney, Plaintiff's counsel and Defendant's counsel, Plaintiff's medical and other

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[1] See the Report of the Road Accident Fund Commission (2002).

[2] 'Social security' has been defined by the International Labour Organisation Convention 102 of 1952 as *"The protection that society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or the substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children."* See also the White Paper on Social Welfare: *"Social security covers a wide variety of public and private measures that provide cash or any kind of benefit or both, firstly, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at an unacceptable social cost and such person being unable to avoid poverty, and, secondly, in order to maintain children. The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution."* Government Gazette 18166 of 1997, Chapter 7.

[3] In Law Society of South Africa and Others v Minister for Transport and Another (CCT 38/10) [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (25 November 2010) Moseneke DCJ said at para 17: *"It seems plain that the scheme arose out of the social responsibility of the state. In effect, it was, and indeed still remains, part of the social security net for all road users and their dependants."*; In Road Accident Fund and Another v Mdeyide (CCT 10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC) ; 2011 (2) SA 26 (CC) (30 September 2010), it was said at para 125: *"The RAF Act and its predecessors, dating back to 1942, have consistently been regarded as 'social legislation', the primary concern of which was 'to give the greatest possible protection . . . to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle.'"*

'experts' and Defendant's medical and other 'experts' have all been incurred. The taxpayer, as road user through the fuel levy, is liable to meet all these costs which run into thousands of rands. In short, no quantifiable damages or loss was ever sustained as a result of a road accident but plenty of costs have been incurred for the benefit of everyone except road accident victims.

4. I was asked by counsel for the parties to make an order recording their agreement on costs. Much to their surprise, bewilderment and disagreement, I remonstrated with them and tried to point out that this was an abuse of the system of road accident compensation. This judgment is for their benefit as well as that of their attorneys, the Road Accident Fund, the Bar Council and the Law Society.

THE PROCESS OF THE LITIGATION

5. Mr Vennon Motswai ('Motswai') was a pedestrian injured in a motor vehicle accident on the 24th August 2008 in Soweto, Johannesburg.

6. In July 2009 a Third Party Claim From (RAF1) was served on the RAF claiming compensation in a total amount of R120,000.00 (one hundred and twenty thousand rand) including general damages in an amount of R80,000.00 (eighty thousand rand). Attached to the RAF1 was a medical report completed by a doctor DA Louw, recording that he had *"filled it [*the form*] from hospital note"*. The details of the injury was that of *"injured r[igh]t ankle, swollen r[igh]t ankle*" and "*sti [soft tissue injury] r[igh]t ankle*" for which the treatment of X-rays and analgesics was given. In response to the query whether "*permanent disability was expected*", Dr Louw indicated in the negative.

7. On 10th May 2010 summons was issued out of this High Court launching a claim against the RAF in the amount of R390,000.00 (three hundred and ninety thousand rand) plus costs. The particulars of claim aver that the Plaintiff sustained severe bodily injuries[4] and

[4] Paragraph 5.

detailed the nature and extent of such injuries as "*fractured right ankle*".[5] As a result of such injuries it was claimed that the Plaintiff had undergone past medical treatment, would be required to incur future medical and related expenses, had been and would be compromised in his earning capacity and had endured and would endure unspecified pain and suffering, loss of amenities of life and disability.

8. Damages were claimed in the amount of R10,000.00 (ten thousand rand) for past hospital expenses, R10,000.00 (ten thousand rand) for past medical expenses, R50,000.00 (fifty thousand rand) for estimated future medical expenses, R100,000.00 (one hundred thousand rand) for future loss of earnings/earning capacity, R20,000.00 (twenty thousand rand) for past loss of earnings and R200,000.00 (two hundred thousand rand) for general damages for pain and suffering, loss of amenities of life and disability.

9. Defendant pleaded that it has no knowledge of the allegation, put Plaintiff to the proof thereof and denied that it was liable as alleged in the summons. Both parties proceeded to prepare for trial. There were exchanges of notices in terms of Rules 35, 36 and 37 of the Supreme Court Rules – notices amounting to no less than 48 pages in the notices bundle, 6 pages in the discovery bundle and 4 pages in the employment bundle.

10. A trial date was allocated, viz the 13th November 2012, of which the Plaintiff's attorney gave notice to Defendant's attorney on 6th March 2012.

11. On 12th October 2012 Mr Geoffrey Read, orthopaedic surgeon, was requested by Plaintiff's attorneys to examine Motswai which he did on 18th October 2012. His undated report records that the patient "*sustained a soft tissue injury of the right ankle. This was treated conservatively. The records note that his ankle was bandaged.*"

12. On 23rd October 2012 a "*newly completed MMF 1 form*" was discovered which form was dated 18th October 2012 and signed by Dr L Erasmus who recorded that the injuries sustained by Motswai was a "*r[ight] ankle: soft tis[sue] injury (sprain)*".

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[5] Para 6.1.1.

13. Dr Read referred Motswai to Drs Matissonn and Partners, radiologists, who found no abnormalities at all in the right ankle or foot.

14. Notices in terms of Rule 36(9)(a)[6] indicate that Plaintiff's attorney intended calling Mr Read as also Adri Roos, occupational therapist and Ben Moodie, industrial psychologist, as "*experts to give evidence on its behalf at the trial of this matter*". I do not have any reports from either Roos or Moodie in the file presented to me.

15. The Defendant procured the reports of orthopaedic surgeon, Mr van Niekerk (8 pages) dated 27th August 2012, radiologists Bloch and partners (1 page) dated 27th August 2012, occupational therapist Megan Spavins (16 pages) dated 18 October 2012 and psychologists Lance Marais Inc (14 pages) dated 22nd October 2012.

SETTLEMENT IN CHAMBERS

16. This matter was set down for hearing on 13th November 2012. Advocates Pottinger and Tshidada appeared before me in chambers. They informed me that there was only one outstanding issue: whether any sum of money should be paid to Plaintiff in respect of loss of earnings by reason of his having to attend at physiotherapy. I was informed that the sum involved was in the region of R550.00 (five hundred and fifty rand). Plaintiff is employed three days a week as a packer. On the basis of the information available to me I determined, within 30 seconds, that there was no basis upon which any payment should be made to the Plaintiff. If Plaintiff requires physiotherapy four years after the soft tissue injury to his ankle, he is perfectly able to utilise the days of the week when he does not work to access such treatment.

17. As soon as I had made that determination, I was presented with a previously typed Draft Order.

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[6] Pages 19-24 of the notices bundles.

18. Paragraph 1 of the Order records that the RAF is liable for 80% of Plaintiff's agreed or proven damages. Paragraph 2 records that the Defendant shall furnish the Plaintiff with an undertaking for 80% of costs of future medical treatment which may be incurred by the Plaintiff.

19. The remaining paragraphs 3 to 6 of the order pertain only to the issue of the costs of this litigation. Paragraph 3 requires the RAF to pay Motswai's taxed or agreed party-party costs on the High Court scale including the costs attendant upon obtaining medico-legal reports and then deals with issues pertaining to taxation (paragraph 4) and the recovery of fees from Mr Motswai by his attorney (paragraphs 5 and 6).

NO TRIABLE ISSUE

20. A number of issues emerge very clearly from this simple scenario. I am informed by the many judges of this Division with whom I have consulted that what I have experienced in this matter is not unusual.

21. This action should never have been instituted and no litigation should have been pursued, let alone to the courtroom.

No Serious Injury – no basis for claim

22. The first consultation between Motswai and his attorney was on 27th August 2008.[7] At that date, there still remained some three years for submission of Motswai's RAF claim (if any) and summons (if any).[8] On that date Motswai signed a medical consent form authorising and empowering both the RAF and Wim Krynauw Attorneys *"to have access to and to inspect all the records concerning my treatment"*.

[7] Apparently on 27th August 2008 when a special power of attorney from Motswai to attorney Wim Krynauw Attorneys was signed.
[8] Section 23 of the RAF Act 56 of 1996.

23. Those hospital records from Chris Hani Baragwanath Hospital[9] indicate at pages 37 and 38 that Motswai suffered no more than a "*swollen*" and "*tender*" right ankle. It is specifically recorded that X-rays were taken and there were no fractures. *'RICE'* (being rest, ice, compression and elevation) was advised and *"analgesics, crepe support bandage"* prescribed.[10]

24. On receipt and perusal of the hospital records, Motswai's attorney would immediately have become aware that there could not possibly ever have been or would be a claim based upon a 'serious injury' as envisaged in the RAF Act and Regulations.[11] This was certainly known to his attorneys by July 2009.[12]

25. It is therefore inexplicable that the attorneys completed the RAF1 claim form in July 2009 in the manner in which they did. There was, at that time, no need for haste or justification for lack of preparation – after all, this claim was submitted within a year of the accident. The claim as formulated – both as to the quantum and ratio therefore – was known by the claimant's attorney to be unsupported by the facts.

Officer of the Court preparing and signing pleadings known to be based on untrue allegations

26. It is unconscionable that the attorneys prepared particulars of claim in May 2010 in the manner in which they did. These particulars persist in the claim for general damages by reason of a 'serious injury' and specify the nature and extent of such injuries to be

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[9] Pages 27 to 39 of annexures to RAF1.

[10] The documentation from the Chris Hani Baragwanath Hospital apparently records treatment afforded to Mr Motswai during 2006/2007 in respect of another alleged injury as well as August 2008 in respect of the injuries which form the foundation of this litigation. The dates are distinct and there could have been no confusion on the part of the attorney as to what were the injuries allegedly sustained in August 2008. His attorney should have been astute to ensure there was no connection between that treatment and the 2008 injury (as indeed that there seems not to be).

[11] Section 17(1)(A) and Regulation 3 of 2008 Regulations.

[12] In July 2009 those hospital records were attached to the RAF1 claim form and Dr Louw had completed the medical form based thereupon.

"*fractured right ankle*".[13] This is a fabrication. This is an untruth. The hospital notes say exactly the opposite – they record that an X-ray was done and there were no fractures.

27. I cannot assume that the attorney never read or understood the hospital records – they took me less than five minutes in chambers to decipher. I can therefore only assume that the facts speak for themselves – the attorney was willing to prepare a claim and to draft particulars of claim which he or she knew to be untrue.

28. The attorney signed the particulars of claim[14] on 30th March 2010 on the basis that he or she was "*admitted to appear in the High Court of South Africa in terms of Section 4(2) of the Right of Appearance in Courts Act 62 of 1995*". In other words, an officer of the court knowingly prepared a court document containing untruths which untruths were material to that court document.

29. The very foundation of the litigation, as set out in the particulars of claim, is not true. There can be no excuse therefore. Firstly, prescription was not looming. There was no sudden last minute composition of pleadings. Panic or anxiety could not have occasioned this untruth. Secondly, this is not a case of a computer churning out a pro-forma document. Personal details of the Plaintiff and the accident are inserted. The detail of the injury is inserted. The foundational pleading to litigation can never simply be a computer generated 'one size fits all' form.

30. The requirement of signature of particulars of claim reflects the importance of both the document and the signature. That the signatory must either be an advocate or an attorney with a certain degree of expertise highlights the value to be ascribed to the signature. By appending one's signature to a pleading, the attorney or advocate confirms that he/she has been scrupulous in preparing the pleading.

31. In the present case, this signature debases the meaning of signatures on particulars of claim and the trust which can be placed thereupon.

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[13] Para 6.1.1.
[14] Page 12 of the pleadings.

32. When I commented to Advocate Pottinger, appearing for the Plaintiff, that this summons should never have been issued, he was adamant that I misunderstood the process and responded that it was practice to issue a summons and then conduct an investigation into the circumstances of the claim and the sequelae. I strongly disagree. Any reasonable legal representative first investigates whatever has been told to them by a client before entering into litigation.

The Duty of Legal Representatives

33. In Vassen v Law Society of the Cape of Good *Hope* (468/96) [1998] ZASCA 47; 1998 (4) SA 532 (SCA); [1998] 3 All SA 358 (A) (28 May 1998), the Supreme Court of Appeal stated that: *"an attorney, as any other officer of the court is an honourable profession which demands complete honesty, reliability and integrity from its members..."* while in S v Nyoka [2009] JOL 24504 (ECG) the court reminded practitioners at para 33 that: *"Attorneys... should have a high regard for truthfulness, be incorruptible and have a high sense of honour and integrity. They are an integral part of the administration of justice and people should be able to trust them, especially where trust monies are involved."*

34. The comments in Jwili v Road Accident Fund (2009/12886) [2010] ZAGPPHC 37; 2010 (5) SA 32 (GNP) (6 May 2010), Tshabangu v Road Accident Fund (2009/49589) [2011] ZAGPJHC 145 (19 October 2011), Kunene v Road Accident Fund (07/8693) [2011] ZAGPJHC 194 (8 December 2011) and Sibeko v Road Accident Fund (43241/08) [2012] ZAGPJHC 43 (28 March 2012) have given a clear indication to attorneys of the expectations of them from our courts. Pleadings should not be "*a fabrication*", legal practitioners "*have a duty to the court, not only to his client, and must not misrepresent facts to the court*". Matters should not *"proceed to trial when it never should have done so"*, when "*there are truly no triable issues*" and only if it "*is responsibly contestable*".

35. These and other judgments, Pretoria Society of Advocates and another v Geach and others [2011] 4 All SA 508 (GNP), Vassen *supra*, Pithey v Road Accident Fund

(A375/2010) [2012] ZAGPPHC 158 (10 August 2012) have commented adversely upon legal representatives who are only concerned to *"continue to earn fees while [he] remained in the case...whether or not he conducted the case indifferently or well, he would still be paid"*, who *"mount the steed of greed"* or who are *"greedy legal representatives prepared to fraudulently enrich themselves from the funds intended to compensate road accident victims"*.

36. It is my view that, on the facts before me, the attorney representing Motswai is deserving of all the above comments on his professional and personal behaviour. He has behaved in a manner which was described in Sibeko *supra* as *"legally untenable, iniquitous and ethically unconscionable"*.

37. This judgment will be sent to the Law Society of the Northern Provinces and the issue of costs being awarded de bonis propriis will be heard later.

No Actual Financial Loss or Quantum of Damages – Who will receive money? – Not the road accident victim

38. By way of particulars of claim prepared in March 2010 and summons issued in May 2010, damages were claimed in the summons in the total amount of R390,000.00 (three hundred and ninety thousand rand) and were then detailed under different heads. The damages were differentiated under certain heads. In each case, it is of some concern that these sums were claimed at all, let alone in these amounts.

39. Past hospital expenses were claimed in the amount of R10,000.00 (ten thousand rand) and past medical expenses were claimed in the amount of R10,000.00 (ten thousand rand). Yet the Plaintiff had never incurred any such expenses. He was treated at Baragwanath hospital in August 2008 and there is no reference in any document to any further treatment required or obtained at all, let alone at any cost.

40. Future medical expenses are estimated in the region of R50,000.00 (fifty thousand rand). Yet the only records – from 2008 to 2012 – indicate that there was never more than a

soft tissue injury or sprain and no treatment was advocated other than the usual analgesics, compression etc. The report of the surgeon, Mr Read, dated October 2012 suggests future expenses which neatly add up to R45,000.00 (forty five thousand rand). These expenses consist in "*analgesics, anti-inflammatories, muscle relaxants, biokinetics and physiotherapy*" which will cost approximately R10,000.00 (ten thousand rand) while Mr Read "*believes that there is 20% chance that he will require arthroscopy of the right ankle at which time any internal derangement can be better assessed and attended to*" which will cost in the region of R35,000.00 (thirty five thousand rand). I am concerned that this estimate of possible future expenses has not really been substantiated.

41. The sum of R20,000.00 (twenty thousand rand) was claimed for past loss of earnings and R100,000.00 (one hundred thousand rand) was claimed for future loss of earnings or earning capacity. How these claims for a sprained ankle could ever have been formulated is inexplicable. On 27th August 2008 (the day he consulted his attorneys) Motswai deposed to an affidavit stating that he was "*unemployed*". By the time he saw Mr Read in October 2012, less than a month before trial, Motswai was in employment three days a week as a handyman/packer/general worker at a retail outlet. Mr Read recorded that "*he copes with this work. He denies any loss of productivity at work as a result of the right ankle injury sustained in this accident*".

42. The claim for general damages for pain and suffering, loss of amenities or life and disability in the amount of R200,000.00 (two hundred thousand rand) has already been discussed. Absent 'serious injury', the proviso to section 17(1)(b) of the RAF Act does not permit compensation to be paid for non-pecuniary loss or general damages. In this matter, there never was any 'serious injury' and never could have been general damages.

43. These criticisms are all borne out by the agreement of settlement which was presented to me to make an Order of Court. Not one penny (or even farthing) is envisaged by that agreement to be paid over by the RAF to Motswai. He could not, in terms of that agreement, receive any money in his own hands for past hospital or medical expenses, past or future loss of income, future medical expenses or general damages.

44. Notwithstanding, that there was a brief moment (a few seconds or minutes) where Motswai might have received some R550.00 in respect of loss of earnings if he might have taken time off work to undergo physiotherapy, that possibility disappeared once I was asked to determine whether he should utilise his non-working days in the week for such treatment if it ever eventuated. In any event, such issue was never even included in the Draft Order.

The undertaking for future medical expenses

45. Invariably, the RAF meets the future hospital, medical and other health related expenses for which it is liable through issue of an undertaking in terms of section 17 of the RAF Act. The RAF no longer pays over substantial sums of money to the road accident victim to be utilised as and when required for medical or other treatment or facilities.[15]

46. On the day of the trial, the merits were settled in an allocation of liability between the parties – the RAF liable for 80% of Motswai's health related expenses and Motswai liable for 20% of his health related expenses. In terms of the agreement presented to me, the RAF will meet this 80% of expenses only *"after such costs have been incurred and upon proof thereof"*.

47. Motswai was never going to receive any monies in respect of treatment for the sprain to his right ankle. Between the accident in August 2008 and the trial in November 2012, there is no indication that he ever required any treatment subsequent to the painkillers and compression bandage originally prescribed. There is therefore no refund due to him.

48. In respect of the highly unlikely event that (four years after the sprain) he does require aspirin, a bandage, physiotherapy or even surgery – he will have to pay for such treatment himself at a private pharmacy, clinic, hospital or healthcare provider and then ask the RAF to reimburse him 80% of what he has paid out.

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[15] Whether or not such expenses are actually incurred, the calculation was sufficient and such monies were utilised by the road accident victim for the purposes intended has been the subject of much debate and has probably contributed to the increased utilisation of section 17 undertakings. See chapter 21 of the RAF Commission Report.

49. The value, if any, of such apportioned undertakings has been the subject of much criticism.[16] In Dladla v Minister of Defence 1988(3) SA 743 WLD, Goldstone J expressed his disquiet about the practical effect of the issue of undertakings in circumstances where there had been an apportionment. He said:

> *"It is not difficult to conceive of the case where an impecunious person would be financially unable to incur the cost and would thus be unable to claim compensation in terms of the undertaking. That, I might say, will particularly be the case where, unlike the present, the defendant is liable for a small proportion rather than a large proportion of the costs in question. In such a case, it seems to me, it would not be difficult to conceive of a situation where the certificate would be rendered worthless to a Plaintiff to whom such an Undertaking was given."*

50. Regrettably, the practical and humane approach of Blieden J in Ndebele v Mutual & Federal Insurance Co Ltd 1995 (2) 699 WLD[17] to the effect that an apportioned undertaking would have a *"harsh, unjust and unreasonable result"* which would be *"absurd or anomalous"* was rejected by majority of the Supreme Court of Appeal[18] which court was, of course following an approach as yet uninformed by the new Constitutional dispensation.[19]

51. The upshot is that Motswai was never going to receive any money for health related expenses and now will only receive a refund of 80% of any expenses which he might incur. Since he is employed three days a week as a general packer, it is highly improbable that he would personally ever incur the costs of healthcare from private healthcare providers. The result is that Motswai will continue to seek and receive healthcare from the public sector at no cost to himself. The undertaking will involve no cost to the RAF. The RAF will therefore not be asked to refund any expenses incurred by him.[20]

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[16] See Chapter 23 of the RAF Commission Report.
[17] See also the unreported judgment in Mouton v the RAF & 2 others 2005 JOL 13227 (W).
[18] See also Mutual & Federal Insurance Co Ltd v Ndebele 1996 (3) SA 553 SCA.
[19] The road accident took place in March 1990.
[20] The basis upon which an agreement was reached that Motswai would be liable to 20% of costs is unknown to me. Obviously, such a result is most favourable to the RAF which therefore will probably never be asked to make any payment in terms of this undertaking. I have some concerns that Motswai's representatives may have taken the very practical view that any requirement of future healthcare was so minimal as to be irrelevant and, in any event, that was never the purpose of this litigation.

52. In short, this apportionment of liability and hence of the undertaking was an irrelevance in this particular case and never involved any benefit to Motswai personally.

REWARDS FOR FACILITATORS

53. One must then ask a number of obvious questions:

53.1 What was this litigation all about?

53.2 Why was a claim submitted and a summons ever issued?

53.3 Was there ever any realistic expectation that Motswai was going to get any money in his hands?

53.4 If not, in whose hands would any money be received?

Legal Enrichment

54. The answer to all these questions is, to my mind, to be found in the accepted litigation practice that 'costs follow the result'.[21] Once the RAF is liable for any damages or loss sustained in any road accident then the RAF is also liable for the costs occasioned by the road accident victim in pursuing and proving such claim.

55. This is confirmed by paragraph 3 (and 4, 5 and 6) of the Draft Order which provides that *"The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale..."*.[22]

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[21] See Cilliers, Loots and Nel *Civil Practice of the High Courts of South Africa* 5th ed (2009) pp 949 onwards.

[22] I do not think the issue of contingency fees is of moment in this particular case. Clause 13 of the Power of Attorney dated 27 August 2008 authorises Motswai's attorneys *"to deduct an attorney and own client account from the monies received from the RAF on successful completion of the claim"*. There is reference to a *"contingency fee agreement"* entered into between Motswai and his attorney in paragraph 5 of the Draft Order. Paragraph 6 of the Draft Order provides that *"the Plaintiff's attorney shall only be entitled to recover from the Plaintiff such fees as are taxed or assessed on an attorney and own client basis. The fees recoverable as aforesaid are not to exceed 25% of the amount awarded or recovered by the Plaintiff"*. Since Motswai recovered no monies as damages, his attorney recovers nothing in terms of the contingency fee agreement because there is nothing from which that attorney client fee can be recovered. In fact, it was probably apparent from the very outset that Motswai would never receive any money. I doubt very much that Motswai's attorney ever anticipated recovering an attorney-client fee in terms of this agreement since it is difficult to envisage any compensation whence it could be paid.

56. Those who naively believe that the system of road accident compensation exists for the benefit of road accident victims might be surprised to find that the victim's attorney and advocate and expert witnesses will be rewarded notwithstanding absence of payment to the road accident victim of any actual money as damages or compensation. One might well question where the success is to be found for Motswai's attorney to recover costs? After all, Motswai has not and will not receive one penny or any benefit from this entire exercise.

57. The clue is to be found in paragraphs 1 and 2 of the Draft Order presented to me. The RAF has agreed to be liable for 80% of Motswai's "*agreed or proven damages*" and Motswai is to be furnished with a section 17 undertaking for 80% of the healthcare expenses paid by him.

58. I am astounded that two advocates could present a judicial officer with a Draft Order purporting to record a successful outcome for a Plaintiff in that the Plaintiff is to receive a percentage of his "*agreed or proven damages*" where no such damages have been found to exist, no compensation is to be paid and it is improbable that any expenses will be pre-paid for which a refund will ever be received.

59. Plaintiff's counsel argued that the apportioned undertaking is the compensation which Motswai will receive. Mr Pottinger could not comprehend my pessimism as to the total lack of value in such apportioned undertaking. He argued that the Draft Order was a clear indication that Plaintiff had been successful. Plaintiff would receive 80% of his "*agreed or proven damages*" and the damages might be future healthcare for which he may personally pay and then recover 80% of such pre-payment. I am totally unconvinced by Mr Pottinger's submissions. My reasons are set out above.

60. The road accident victim has proven no financial loss or damages as a result of this road accident. Correctly, there is no compensation payable to the road accident victim. In fact, there is no benefit whatsoever to the Plaintiff arising out of this litigation. He receives

nothing. From the documentation in the court file there is no indication that it was ever anticipated that he would ever receive any compensation.

61. However, his legal representatives are certainly enriched. The attorney can claim for consultations, correspondence and telephone calls, perusal of documents, drafting of documents and pleadings, commissioning of 'expert' reports, drafting of notices, collation of documents and preparation of bundles for trial. The attorney can claim for briefing counsel, consulting with counsel, attending at court, negotiations and concluding an agreement. The advocate can claim for preparation for trial and a trial fee.

Expert Enrichment

62. Paragraph 3 of the Draft Order provides that the costs for which the RAF is liable shall include *"the costs attendant upon the obtaining of the Medico-Legal reports and/or preparation fees and/or joint minutes if any and as allowed by the Taxing Master of the following experts: Dr Read; B Moodie."*

63. Mr Read and Ms Moodie are described in the Rule 36(9)(a) notices as *"experts"*. They regularly appear in this High Court as 'expert witnesses'. Their academic training and qualifications are not doubted.

64. I do question the need for either Read or Moodie to have been commissioned to consult Motswai and prepare reports as 'experts' in this matter. What facts have been or are about to be laid before a court which can only be understood through the expert opinion of an orthopaedic surgeon or industrial psychologist? An opinion is only of assistance to a court where facts requiring skill and expertise beyond those of the judicial officer are led in evidence. In the present case there are none.[23]

65. For some reason Plaintiff's attorney occasioned the cost of an orthopaedic surgeon who then incurred the cost of a radiologist. It is inexplicable that a "*sprain*" which has not

[23] See Holtzhauzen v Roodt 1997 (4) SA 766 (W).

resulted in inconvenience in the intervening four years should require the examination and report of an orthopaedic surgeon.

66. I am surprised that Read, who conducts innumerable such examinations for Plaintiff attorneys in road accident compensation litigation, on discovering that the only medical issue was a four year old ankle sprain, did not immediately contact Plaintiff's attorneys and point out that there was no 'serious injury', no disability, no loss of income and no need to further investigate or prepare a report.

67. I am further surprised that Read, whose reports are presented to this court by Plaintiff attorneys on an almost weekly basis, did not decline to prepare a report where there was little or nothing to report upon. Instead he prepared a report of some 8 pages recording his examination of the Plaintiff's head and neck, upper limbs, shoulders, humeri, elbows, radii and ulnae, wrists, hands, thoracic spine, lumbar spine, lower limbs, gait, pelvis, hips, femora, knees, tibiae and fibulae. It is recorded that there is no swelling of either the left or right ankle, that the patient has a normal range of movement at both ankle joints. All that is found is that *"on palpation, he is tender behind the medial and lateral malleoli"* of the right ankle.

68. I am even more surprised that Read, who is presented as a witness in our court rooms by Plaintiff attorneys on a frequent basis, has apparently held himself available as a witness for the trial. Read is aware that his examination and report reveals nothing beyond *"tenderness"* and then only *"on palpation"*.

69. For some reason Plaintiff's attorney occasioned the cost of 'B Moodie' whose report is not in the court file but whom a notice in terms of Rule 36(9)(a) identifies as an 'industrial psychologist'. Motswai was a gardener prior to the accident, he was unemployed at the time of the accident according to his affidavit, he is now employed as general worker and his work is not impeded by the sprain sustained some four years ago. Since I do not have any report from B Moodie I can make no comment on the length, content or value thereof.

70. However, I express the same surprise that Moodie whose services (like Read) are frequently utilised by attorneys for Plaintiffs in road accident litigation did not exercise a professional discretion to point out that it was inadvisable to continue with consultation and testing, writing of a report and being available for trial in the circumstances of this Plaintiff and this case.

71. As long ago as 1994 an editorial in a publication of the English Bar, counsel wrote an editorial commenting

> "*Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns: there is a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients. The disclosure of expert reports, which originally seemed eminently sensible, has degenerated into a costly second tier of written advocacy. Costs of experts have probably risen faster than any other element of litigation costs in the last twenty years.*"

In his report, Access to Justice, the Master of the Roll and Lord Chief Justice of England, Lord Woolf, commented that

> "*the need to engage experts was a source of excessive expense, delay and, in comes cases, increased complexity through the excessive or inappropriate use of experts. Concern was also expressed as to their failure to maintain their independence from the party by whom they had been instructed.*"

72. Expert witnesses have unkindly been described as "*hired guns*" and "*professional witnesses*" whose perceived lack of impartiality, subordination of professional independence to the cause of those who instruct them and financial reliance upon such instructions have led to much criticism.[24] It is not surprising that new Civil Procedure Rules were introduced in the United Kingdom over ten years ago[25] requiring the courts to control the leading of 'expert' evidence. In that jurisdiction experts are reminded of their duty to help the court which duty "*overrides any obligation from the paymaster; the expert seeks directions from the court*" and the expert is required to depose to an affidavit

[24] See Chapter 24 of the Report of the Road Accident Fund Commission at pages 732 – 734.
[25] Came into operation on 26 April 1999.

in which he or she records the understanding that his or her primary duty is to the court and that he or she has not included anything in the expert report which has been suggested to him by anyone, particularly including his instructing lawyers.

73. I do not suggest that all or any of the medical professionals whose services were utilised in this case were or are "*hired guns*" who have compromised their independence.

74. However, I do strongly advocate that the use of experts, in any capacity – examiners, writers of reports, witnesses – must be carefully assessed in every case and all facilitators of access to road accident compensation must be astute to enquire whether there is need for such expertise[26] and whether such costs are justified. I do not believe that this has happened in the present instance.

Enrichment of Facilitators

75. I do not know how many thousands of taxpayer rands will be expended on the enrichment of facilitators in this matter.

76. However, I have had the opportunity to check the expenditure on portion of costs in one matter in which I presided as the trial judge. In Ward v RAF (Case 96/25260) Plaintiff claimed R1,231,850.00, the Defendant RAF offered R214,311.00 and portion of the claim was settled in the amount of R275,454.00. At trial an award of R500,000.00 was made by the court where there had been a tender of R19,403.00. The known costs of the 11 day trial were R189,941.00 paid by the RAF to its attorneys, advocates and experts plus, of course, the costs of the RAF administration and staff; R188,016.00 paid by the Defendant RAF to the Plaintiff in respect of a party-party contribution to attorneys, advocates and experts plus, of course, the attorney-clients fees and disbursements for which the RAF was not liable and to be paid by the Plaintiff. In other words the total

[26] See Holtzhauzen *supra*.

known costs of R377,958.00 plus considerable unknown costs were incurred in respect of a dispute over R480,597.00 – the costs were almost equal to the compensation sought.[27]

77. I have no reason to think that the proportions of costs would be any different in this matter.

The RAF administrators, attorneys and experts

78. The RAF administrators and attorneys cannot emerge unscathed from this critique. The RAF and their attorneys appear to have been supine and uncritical when confronted with this claim. In fact, they appear content to have proceeded upon the same road to legal and 'expert' enrichment.

79. The RAF1 claim form indicates in the completed medical form and in the hospital records attached thereto that the claimant had sustained no more than a tender and swollen ankle which was definitely not a fracture. Yet, the RAF1 form included a claim for non-pecuniary loss based upon 'serious injury'. There was no 'Serious Injury Assessment Report' completed or submitted. There was no indication at all of any 'serious injury'.

80. However, the RAF appears to have failed to even notice that there was no injury other than a swollen and tender ankle. One must question whether a RAF claims handler even read the claim form and the medical report attached thereto. It would certainly seem, even if the form and the medical report was read, that no one applied their mind thereto. There is no suggestion that any mental application or consideration was brought by the RAF and its staff to this claim and these documents.

81. There is also complete absence of any critical appreciation by the RAF of the content of the claim. Even if there was such mental application and critical appreciation, there was certainly no professional action in response thereto.

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[27] Chapter 24 of the Road Accident Fund Commission Report at page 731.

82. There is no indication that the RAF acted in terms of section 24(5) which entitles the RAF, within 60 days, to object to the validity of the claim. There is no indication that the RAF acted in terms of Regulation 3 which entitles the RAF to require production of a Serious Injury Assessment Report or direct the claimant to further assessment for 'serious injury' by medical practitioners of its choice. After all, the summons persisted in the claim for non-pecuniary loss based upon 'serious injury' which indicates that the RAF had not objected to the validity of that claim on receipt of the RAF1 form.

83. The summons was served on 12th May 2010, attorneys were instructed and the action was defended. Plaintiff's discovery affidavit discloses no more than two letters exchanged between attorneys subsequent to service of the summons – 24th May 2010 and 4th August 2010. I do not know the contents of these two letters.

84. I do not know if the RAF or its attorneys noticed the discrepancy in the nature of the injury recorded in the RAF1 claim and the hospital records and that alleged in the particulars of claim. I do not know if the RAF or its attorneys compared the documents and noted the discrepancy between the non-fracture and the 'fracture'. If they did notice that the hospital records and RAF1 claim contradicted the particulars of claim, it may be that the RAF attorney's letters of 24th May 2010 pointed this out and the Plaintiff's attorney conceded the lack of serious injury in their letter of 4 August 2010. It may be that the claim for general damages was abandoned by August 2010.

85. However, if the claim for general damages had been abandoned by August 2010, then it is somewhat surprising that the RAF attorneys procured the reports of an orthopaedic surgeon in August 2012, radiologists in August 2012, an occupational therapist in September 2012 and an industrial psychologist in October 2012. After all, if the claim for general damages had been abandoned then the value of such reports in respect of the remaining claims is dubious. The claim for future loss of income was R100,000.00 (and that for general damages was R200,000.00).

86. The orthopaedic surgeon, Mr van Niekerk, recorded in August 2012 that measurement and flexion of Motswai's lower limbs was "*normal*", absence of a limp and "*on stressing no abnormal movement*". All that is found is that "*on palpation of the foot, he complains of some tenderness*" and "*on stressing...he experiences minimal discomfort*". The conclusion of van Niekerk was "*I don't think he really needs any treatment*". At most van Niekerk thought there could be some physiotherapy for pain.

87. With such orthopaedic surgeon's report, the purpose of obtaining a report from either or both the occupational therapist or industrial psychologist is inexplicable. The occupational therapist prepared a 16 page report which dealt *inter alia*, with his social circumstances, living arrangements, education and training, a psychological screening and daily living activities when Motswai himself said there was "*no difficulty in performing work duties other than cramping in the right leg with heavier lifting tasks*". Similarly, the psychologist prepared a 14 page report dealing *inter alia* with family and social history, the educational history, work history, career ceiling and earning potential when the sum total of Motswai's complaints was that "*he struggles to walk fast*", "*he cannot run*", "*he has dreams about the accident*", "*his hands perspire when he is sleeping*" and "*he believes he suffers from hypertension*" in circumstances where Motswai has disclosed to all medical practitioners that he lives with a chronic illness.

88. Again the rationale for seeking such examinations and reports is difficult to understand both in law[28] and in common sense. Again the costs escalate enormously – both the attorney's fees and disbursements and for the payment of 'experts'.

89. I fail to understand why the RAF and its attorneys and its counsel agreed to a Draft Order which provided that costs would be paid "*on the High Court scale*" when the outcome only justifies costs on the Magistrate's Court scale. The original claim may have been for an amount in excess of the Magistrate's Court jurisdiction but the outcome of nil payment means that, at most, costs on the lower tariff would be justified. Are the RAF and its legal representatives so disregarding of the manner in which the fuel levy is expended or does

[28] Holtzhauzen *supra*.

payment to both attorney and counsel acting for the RAF differ according to the High Court or Magistrate's Court litigation?

COSTS

90. I do not believe that either the Plaintiff's or Defendant's attorneys should receive any fees at all in respect of this claim or litigation. I also do not think that the expenses incurred in respect of 'experts' by either the Plaintiff's or Defendant's attorneys should be a burden on the public purse. If those experts are to be remunerated, I believe that the attorneys should meet these disbursements *de boniis propriis*.

91. However, neither firms of attorneys were alerted to this possibility prior to trial. They are entitled to make submissions in respect of these issues. They are also entitled to be represented at such hearing. Accordingly, the issue of attorney's fees and disbursements will be postponed for hearing on a date to be arranged.

92. Counsel should not be paid on the High Court scale but on the Magistrate's Court scale. I do not know what advice, if any, was given by counsel to their attorneys. I would hope that both counsel informed their attorneys the minute they received these briefs that there was nothing to litigate, that this matter should be settled out of court, that no trial fees should or would be incurred.

ORDER

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1. By agreement between the parties it is ordered:

    a. The Defendant is liable for 80% of the Plaintiff's agreed or proven damages;

    b. The Defendant shall furnish the Plaintiff with an undertaking as envisaged in section 17(4)(a) of the Road Accident Fund Act, Act 19 of 2005, for 80% of the

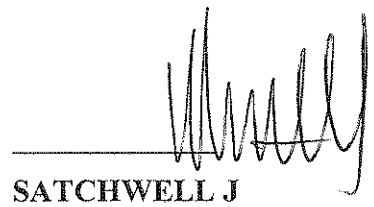
costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service, or supplying of goods to the Plaintiff arising out of the injuries sustained by the Plaintiff in the motor vehicle collision which occurred on 24 August 2008, after such costs have been incurred and upon proof thereof.

2. Plaintiff and Defendant attorneys are ordered to produce to the Senior Registrar of this court, Mr Pather, within 15 days of the date of this order, copies of original invoices and fee statements in respect of counsel's fees, copies of original invoices and fee statements presented by each 'expert' from whom a report was commissioned and/or who was asked to hold themselves available for trial, copies of all proofs of payment/EFT transfers between aforementioned parties.

3. The question of recovery of fees and disbursements by both Plaintiff and Defendant's attorneys is postponed for hearing on a date to be arranged.

4. This judgment is to be forwarded to the Law Society of the Northern Provinces, the Bar Council, the Chairperson of the Road Accident Fund, the Minister of Transport and the Health Professions Council.

DATED AT JOHANNESBURG ON THIS 7th DAY OF DECEMBER 2012.



SATCHWELL J

JUDGE OF THE HIGH COURT

APPEARANCES:

PLAINTIFF:	C Pottinger
	Instructed by Wim Krynauw Attorneys, Johannesburg
DEFENDANT:	TC Tshidada
	Instructed by Sishi Incorporated, Johannesburg