

**MOTSWAI v ROAD ACCIDENT FUND 2013 (3) SA 8 (GSJ) A****2013 (3) SA p8**

<b>Citation</b>	2013 (3) SA 8 (GSJ)
<b>Case No</b>	2010/17220
<b>Court</b>	South Gauteng High Court, Johannesburg
<b>Judge</b>	Satchwell J
<b>Heard</b>	November 15, 2012
<b>Judgment</b>	December 7, 2012
<b>Counsel</b>	<i>C Pottinger</i> for the plaintiff. <i>TC Tshidada</i> for the defendant.

**Annotations** [Link to Case Annotations](#)

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**B****Flynote : Sleutelwoorde**

**Motor vehicle accident** — Compensation — Claim against Road Accident Fund — Abuse of system — Alleged 'serious injury' claim pursued and then settled on trial date in order to obtain benefit of costs order — No serious injury, no triable issue and no benefit for nominal claimant — Sole objective **C** enrichment of lawyers and expert witnesses — Amounting to dishonest litigation and abuse of compensation system — Judgment forwarded to various professional bodies concerned — Issue of costs de bonis propriis postponed for hearing.

**Attorney** — Rights and duties — Duties — Duty when signing pleadings — Doing so as officer of court — By appending signature to pleading attorney **D** attesting that he or she was scrupulous in preparation of pleading.

**Headnote : Kopnota**

About a year after the plaintiff was injured in a motor vehicle accident a claim for R120 000 for 'soft tissue injuries' to his right ankle was submitted to the RAF, and a year later a high court summons for R390 000 was issued. The **E** summons alleged that plaintiff had suffered 'severe' bodily injuries, including a fractured ankle, resulting in medical expenses (past and future) of R70 000; diminished earnings/earning capacity (R120 000); general damages (R200 000); and costs. This was despite the fact that hospital records indicated that he had suffered no more than a swollen ankle. Both sides had incurred considerable costs in the course of preparing for trial, only for the matter to be settled on the trial date.

**F** When the presiding judge was presented with a settlement agreement in terms of which the RAF would be liable for (1) 80% of the plaintiff's damages; and (2) plaintiff's party – party costs on the high court scale, she objected to the terms of the agreement and the manner in which the litigation was conducted. She made the following points in this regard:

- By appending their signatures to pleadings attorneys vouched for their **G** scrupulousness preparing the document. Plaintiff's attorney must, however, have realised from the outset that there was no 'serious injury' that would entitle plaintiff to compensation under the RAF Act and regulations. Contrary averments in the particulars of claim were nothing but fabrications, and the conduct of plaintiff's attorney in this regard **H** amounted to dishonest litigation. (Paragraphs

[22] – [31], [36], [38] and [41] at 13D – 14B, 15I, 16B and 16G.)

- Plaintiff was disqualified from compensation since there was never any serious injury, and there was thus no benefit due to him under the settlement agreement. (Paragraphs [42] – [52] and [58] – [60] at 16H – 18F and 19E – 20C.)

- The litigation was conducted purely for the enrichment of his attorney and advocate, and the various medico-legal expert witnesses. (Paragraphs [54], [61] and [74] at 19A, 20D and 22E – F.)

- Administrators and attorneys for the RAF were complicit in this by virtue of their failure to scrutinise the claim form and critically apply their minds to the content of the claim itself, being instead supine and content to proceed on the same road to legal and expert enrichment. (Paragraphs [78] – [89] at 23B – 25B.)

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- This case demonstrated how the road-accident compensation system was being systematically exploited by a predatory cabal of administrators, attorneys, advocates and professional experts, to the detriment of accident victims and taxpayers. (Paragraphs [1] – [3] and [56] at 9A – 11A and 19C – D.)

The judge directed that her judgment be forwarded to the Law Society of the Northern Provinces, the Bar Council, the chairperson of the RAF, the Minister of Transport, and the Health Professions Council of South Africa.

## Cases Considered

### Annotations

#### Case law

*Dladla v Minister of Defence* 1988 (3) SA 743 (W): dictum at 747C – D applied

*Holtzhauzen v Roodt* 1997 (4) SA 766 (W): applied

*Jwili v Road Accident Fund* 2010 (5) SA 32 (GNP) ([2010] ZAGPPHC 37): applied

*Kunene v Road Accident Fund* [2011] ZAGPJHC 194: applied

*Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25): dictum in para [17] applied

*Mouton v Road Accident Fund and Others* [2005] JOL 13227 (W): referred to

*Mutual & Federal Insurance Co Ltd v Ndebele* 1996 (3) SA 553 (A): referred to

*Ndebele v Mutual & Federal Insurance Co Ltd* 1995 (2) 699 (W): approved

*Pithey v Road Accident Fund* [2012] ZAGPPHC 158: referred to

*Pretoria Society of Advocates and Another v Geach and Others* 2011 (6) SA 441 (GNP) ([2011] 4 All SA 508): referred to

*Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) (2011 (1) BCLR 1; [2010] ZACC 18): dictum in para [125] applied

*S v Nyoka* [2009] JOL 24504 (ECG): dictum in para [33] applied

*Sibeko v Road Accident Fund* [2012] ZAGPJHC 43: applied

*Tshabangu v Road Accident Fund* [2011] ZAGPJHC 145: applied

*Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) ([1998] 3 All SA 358; [1998] ZASCA 47): dictum at 538G applied

*Ward v Road Accident Fund* (GSJ case No 96/25260): compared.

### Case Information

*C Pottinger* for the plaintiff.

*TC Tshidada* for the defendant.

Judgment in claim for compensation from Road Accident Fund. The court's order appears at the end of the judgment. **H**

## Judgment

### Satchwell J:

#### Introduction

[1] I spent three and a half years of my life considering the principles and **I** practice of road-accident compensation both in South Africa and throughout the world. <sup>1</sup> During that time I learnt that any system of road accident compensation is intended to form an integral part of a system of

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**A** social security <sup>2</sup> and, as such, is intended to provide protection for members of society who have suffered misfortune. <sup>3</sup> 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 **B** 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 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'.

**C** [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 **D** 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 'experts' and defendant's medical and other

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'experts' have all been incurred. The taxpayer, as road user through the **A** 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 **B** 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. **C**

#### The process of the litigation

[5] Mr Vernon Motswai (Motswai) was a pedestrian injured in a motor vehicle accident on 24 August 2008 in Soweto, Johannesburg.

[6] In July 2009 a third-party claim form (RAF1) was served on the RAF **D** claiming compensation in a total amount of R120 000, including general damages in an amount of R80 000. Attached to the RAF1 was a medical report completed by doctor DA Louw recording that he had 'filled it [the form] from hospital note'. The details of the injury were 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 **E** response to the query whether 'permanent disability was expected', Dr Louw indicated in the negative.

[7] On 10 May 2010 summons was issued out of this high court launching a claim against the RAF in the amount of R390 000 plus costs. **F** The particulars of claim aver that the plaintiff

sustained severe bodily injuries <sup>4</sup> and detailed the nature and extent of such injuries as 'fractured right ankle'. <sup>5</sup> 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. <sup>6</sup>

[8] Damages were claimed in the amount of R10 000 for past hospital expenses, R10 000 for past medical expenses, R50 000 for estimated future medical expenses, R100 000 for future loss of earnings/earning capacity, R20 000 for past loss of earnings and R200 000 for general damages for pain and suffering, loss of amenities of life, and disability. <sup>7</sup>

[9] Defendant pleaded that it had 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 — notices amounting <sup>8</sup> to no less than 48 pages in the notice bundles, 6 pages in the discovery bundle and 4 pages in the employment bundle.

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<sup>9</sup> [10] A trial date was allocated, viz 13 November 2012, of which the plaintiff's attorney gave notice to defendant's attorney on 6 March 2012.

[11] On 12 October 2012 Mr Geoffrey Read, orthopaedic surgeon, was requested by plaintiff's attorneys to examine Motswai, which he did on 18 October 2012. His undated report records that the patient —

<sup>10</sup> 'sustained a soft tissue injury of the right ankle. This was treated conservatively. The records note that his ankle was bandaged.'

[12] On 23 October 2012 a 'newly completed MMF 1 form' was discovered which form was dated 18 October 2012 and signed by <sup>11</sup> Dr L Erasmus who recorded that the injuries sustained by Motswai were a 'r[ight] ankle: soft tis[sue] injury (sprain)'.<sup>12</sup>

[13] Dr Read referred Motswai to Doctors Matissonn & Partners, radiologists, who found no abnormalities at all in the right ankle or foot.

[14] Notices in terms of rule 36(9)(a)<sup>13</sup> indicate that plaintiff's attorney <sup>14</sup> 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.

<sup>15</sup> [15] The defendant procured the reports of orthopaedic surgeon Mr Van Niekerk (8 pages) dated 27 August 2012; radiologists Bloch & Partners (1 page) dated 27 August 2012; occupational therapist Megan Spavins (16 pages) dated 18 October 2012; and psychologists Lance Marais Inc (14 pages) dated 22 October 2012.

### **<sup>16</sup> Settlement in chambers**

[16] This matter was set down for hearing on 13 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 <sup>17</sup> reason of his having to attend at physiotherapy. I was informed that the sum involved was in the region of R550. 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 <sup>18</sup> 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.

<sup>19</sup> [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.

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[19] The remaining paras 3 – 6 of the order pertain only to the issue of the **A** 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 (para 4) and the recovery of fees from Mr Motswai by his attorney (paras 5 and 6). **B**

### 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. **C**

[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 **D** 27 August 2008. <sup>7</sup> At that date there still remained some three years for submission of Motswai's RAF claim (if any) and summons (if any). <sup>8</sup> 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'.

[23] Those hospital records from Chris Hani Baragwanath Hospital <sup>9</sup> **E** indicate at 37 – 8 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. <sup>10</sup> **F**

[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. <sup>11</sup> This was certainly known to his attorneys by July 2009. <sup>12</sup> **G**

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**A** [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 therefor — was known by the **B** 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 **C** in the claim for general damages by reason of a 'serious injury' and specify the nature and extent of such injuries to be 'fractured right ankle'. <sup>13</sup> 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.

**D** [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.

**E** [28] The attorney signed the particulars of claim <sup>14</sup> on 30 March 2010 on the basis that he or she was 'admitted to appear in the High Court of South Africa in terms of s 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 **F** 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 therefor. Firstly, prescription was not looming. There was no sudden, last-minute composition of pleadings. Panic or anxiety could not have occasioned this untruth. **G** 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.

**H**[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, an attorney or advocate confirms that he/she has been scrupulous in preparing the pleading.

**I**[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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[32] When I commented to Advocate *Pottinger*, appearing for the **A** 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 **B** 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* 1998 (4) SA 532 (SCA) ([1998] 3 All SA 358; [1998] ZASCA 47) at 538G the Supreme **C** Court of Appeal stated that being '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 in para 33 that:

'Attorneys . . . should have a high regard for truthfulness, be incorruptible **D** 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 moneys are involved.'

[34] The comments in *Jwili v Road Accident Fund* 2010 (5) SA 32 (GNP) ([2010] ZAGPPHC 37); *Tshabangu v Road Accident Fund* [2011] ZAGPJHC 145 (19 October 2011); *Kunene v Road Accident Fund* **E** [2011] ZAGPJHC 194 (8 December 2011); and *Sibeko v Road Accident Fund* [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', and legal practitioners 'have a duty to the court, not only to his client, and must not misrepresent facts to the court'. A **F** matter 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, eg *Pretoria Society of Advocates and Another v Geach and Others* 2011 (6) SA 441 (GNP) ([2011] 4 All SA 508); **G** *Vassen* supra; and *Pithey v Road Accident Fund* [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 **H** 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 **I** 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. ]

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**A 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 B the total amount of R390 000 and were then detailed under different 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 and past medical expenses were claimed in the amount of R10 000. Yet the C 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. D 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. These expenses consist in 'analgesics, E anti-inflammatories, muscle relaxants, biokinetics and physiotherapy' which will cost approximately R10 000, 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. I am concerned that this estimate of possible future expenses has not really been F substantiated.

[41] The sum of R20 000 was claimed for past loss of earnings and R100 000 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 27 August 2008 (the day he consulted his attorneys) G 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 H 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 of life and disability in the amount of R200 000 has already been discussed. Absent 'serious injury', the proviso to s 17(1)(b) of the RAF Act does not permit compensation to be paid for non-pecuniary loss I 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 J to Motswai. He could not, in terms of that agreement, receive any money

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in his own hands for past hospital or medical expenses, past or future loss A 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 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 B 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 **C** health-related expenses for which it is liable through issuing an undertaking in terms of s 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. <sup>15</sup>

[46] On the day of the trial the merits were settled in an allocation of **D** 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'. **E**

[47] Motswai was never going to receive any moneys 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. **F**

[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. **G**

[49] The value, if any, of such apportioned undertakings has been the subject of much criticism. <sup>16</sup> In *Dladla v Minister of Defence* 1988 (3) SA 743 (W) Goldstone J expressed his disquiet about the practical effect of the issue of undertakings in circumstances where there had been an apportionment. He said (at 747C – D): **H**

'It is not difficult to conceive of the case where an injured impecunious person would be financially unable to incur the cost and would thus be unable to claim compensation in terms of such an undertaking. That,

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**A** 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 undertaking was given.'

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

[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 **D** 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 **E** cost to the RAF. The RAF will therefore not be asked to refund any expenses incurred by him. <sup>20</sup>

[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.

## **F 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?

**G** [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?

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### Legal enrichment<sup>A</sup>

[54] The answer to all these questions is, to my mind, to be found in the accepted litigation practice that 'costs follow the result'. <sup>21</sup> 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. <sup>B</sup>

[55] This is confirmed by 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'. <sup>22</sup>

[56] Those who naively believe that the system of road accident <sup>C</sup>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. <sup>D</sup>

[57] The clue is to be found in paras 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 s 17 undertaking for 80% of the healthcare expenses paid by him. <sup>E</sup>

[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 prepaid for which a refund will ever be received. <sup>F</sup>

[59] Plaintiff's counsel argued that the apportioned undertaking is the compensation which Motswai will receive. Mr *Pottinger* could not

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<sup>A</sup>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 <sup>B</sup>such prepayment. 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 <sup>C</sup>whatsoever to the plaintiff arising out of this litigation. He receives nothing. From the documentation in the court 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 <sup>D</sup>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.

### <sup>E</sup>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 <sup>F</sup>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 Mr Moodie are described in the rule 36(9)(a) notices as 'experts'. They regularly appear in this high court as 'expert witnesses'. **G** 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 **H** judicial officer are led in evidence. In the present case there are none. <sup>23</sup>

[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 resulted in inconvenience in the **I** 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,

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on discovering that the only medical issue was a four-year-old ankle **A** 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 **B** 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 eight 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 **C** 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 **D** in our courtrooms 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 reveal nothing beyond 'tenderness', and then only 'on palpation'.

[69] For some reason plaintiff's attorney caused the cost of 'B Moodie', **E** whose report is not in the court file, but whom a notice in terms of rule 36(9)(a) identifies as an 'industrial psychologist', to be included. 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 a general worker; and his work is not impeded by the sprain sustained **F** 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 **G** that it was inadvisable to continue with consultation and testing, the writing of a report and being available for trial in the circumstances of this plaintiff and this case.

[71] As long ago as 1994 in a publication of the English Bar, counsel wrote an editorial commenting: **H**

'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, **I** 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 — J

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A 'the need to engage experts was a source of excessive expense, delay and, in some 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.'

B[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. <sup>24</sup> It is not surprising that new Civil Procedure Rules were C introduced in the United Kingdom over ten years ago <sup>25</sup> 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 in which he or she records the understanding that his or her primary duty D 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 E 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 F expertise <sup>26</sup> 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 G 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 Road Accident Fund* (GSJ case No 96/25260) plaintiff claimed R1 231 850. The defendant RAF offered R214 311 and portion of the claim was settled in the amount of R275 454. At trial an award of H R500 000 was made by the court where there had been a tender of R19 403. The known costs of the 11-day trial were R189 941 paid by the RAF to its attorneys, advocates and experts, plus, of course, the costs of the RAF administration and staff; and R188 016 was paid by the defendant RAF to the plaintiff in respect of a party – party contribution to I attorneys, advocates and experts plus, of course, the attorney – client fees and disbursements for which the RAF was not liable and which were to

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be paid by the plaintiff. In other words, the total known costs of A R377 958, plus considerable unknown costs, were incurred in respect of a dispute over R480 597 — the costs were almost equal to the compensation sought. <sup>27</sup>

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

### 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 C '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 **D** 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 **E** 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 were read, that no one applied their mind thereto. There is no suggestion that any mental application or consideration was brought to bear by the RAF and its staff on this claim and these documents. **F**

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

[82] There is no indication that the RAF acted in terms of s 24(5), which **G** 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 reg 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 **H** 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 12 May 2010, attorneys were instructed and the action was defended. Plaintiff's discovery affidavit **I** discloses no more than two letters exchanged between attorneys subsequent to service of the summons — 24 May 2010 and 4 August 2010. I do not know the contents of these two letters.

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**A** [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 **B** hospital records and RAF1 claim contradicted the particulars of claim, it may be that the RAF attorney's letters of 24 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.

**C** [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 **D** reports in respect of the remaining claims is dubious. The claim for future loss of income was R100 000 (and that for general damages was R200 000).

[86] The orthopaedic surgeon, Mr Van Niekerk, recorded in August 2012 that measurement and flexion of Motswai's lower limbs were **E** 'normal', the absence of a limp and 'on stressing no abnormal movement'. All that was found was 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 **F** could be some physiotherapy for pain.

[87] With such an orthopaedic surgeon's report, the purpose of obtaining a report from either or both the occupational therapist and industrial psychologist is inexplicable. The occupational therapist prepared a 16-page report which dealt, inter alia, with his social circumstances, **G** living arrangements, education and training, a psychological screening and daily living activities where 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 <sup>H</sup> 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.

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

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[89] I fail to understand why the RAF and its attorneys and its counsel <sup>A</sup> 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 magistrates' court scale. The original claim may have been for an amount in excess of the magistrates' court jurisdiction, but the outcome of nil payment means that, at most, costs on the lower tariff would be justified. <sup>B</sup> Are the RAF and its legal representatives so disregarding of the manner in which the fuel levy is expended or does payment to both attorney and counsel acting for the RAF differ according to the high court or magistrates' court litigation?

### Costs <sup>C</sup>

[90] I do not believe that either the plaintiff 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 or defendant's attorneys should be a burden on the public purse. If those experts are to be remunerated, I believe that the attorneys <sup>D</sup> should meet these disbursements *de bonis propriis*.

[91] However, neither firm of attorneys was 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 <sup>E</sup> postponed for hearing on a date to be arranged.

[92] Counsel should not be paid on the high court scale, but on the magistrates' 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 <sup>F</sup> litigate, that this matter should be settled out of court, that no trial fees should or would be incurred.

### Order

1. By agreement between the parties it is ordered:
  - (a) The defendant is liable for 80% of the plaintiff's agreed or <sup>G</sup> proven damages.
  - (b) The defendant shall furnish the plaintiff with an undertaking as envisaged in s 17(4)(a) of the Road Accident Fund Act 19 of 2005, for 80% of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or <sup>H</sup> 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. <sup>I</sup>
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 <sup>J</sup>

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- A** for trial, and 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.
- B** 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.

Plaintiff's Attorneys: *Wim Krynauw Attorneys*, Krugersdorp.

**C** Defendant's Attorneys: *Sishi Inc*, Johannesburg.

<sup>1</sup> See the Report of the Road Accident Fund Commission (2002).

<sup>2</sup> '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 ch 7.].

<sup>3</sup> In *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25) Moseneke DCJ said in 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* 2011 (2) SA 26 (CC) (2011 (1) BCLR 1; [2010] ZACC 18) it was said in 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.'

<sup>4</sup> Para 5.

<sup>5</sup> Para 6.1.1.

<sup>6</sup> Pages 19 – 24 of the notice bundles.

<sup>7</sup> Apparently on 27 August 2008 when a special power of attorney from Motswai to Wim Krynauw Attorneys was signed.

<sup>8</sup> Section 23 of the RAF Act 56 of 1996.

<sup>9</sup> Pages 27 to 39 of annexures to RAF1.

<sup>10</sup> 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 there seems not to be).

<sup>11</sup> Section 17(1)(A) and reg 3 of the 2008 regulations.

<sup>12</sup> In July 2009 those hospital records were attached to the RAF1 claim form and Dr Louw had completed the medical form based thereupon.

<sup>13</sup> Para 6.1.1.

<sup>14</sup> Page 12 of the pleadings.

<sup>15</sup> Whether or not such expenses are actually incurred, the calculation is sufficient and such moneys are 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 17 undertakings. See ch 21 of the RAF Commission Report.

<sup>16</sup> See ch 23 of the RAF Commission Report.

<sup>17</sup> See also the unreported judgment in *Mouton v Road Accident Fund and Others* [2005] JOL 13227 (W).

<sup>18</sup> See also *Mutual & Federal Insurance Co Ltd v Ndebele* 1996 (3) SA 553 (A).

<sup>19</sup> That accident took place in March 1990.

<sup>20</sup> 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.

<sup>21</sup> See Cilliers, Loots & Nel *Civil Practice of the High Courts of South Africa* 5 ed (2009) at 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 moneys 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 para 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 moneys 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.

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

24 See ch 24 of the Report of the Road Accident Fund Commission at 732 – 4.

25 Came into operation on 26 April 1999.

26 See *Holtzhauzen* supra.

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

28 *Holtzhauzen* supra.

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