SUPERFLUOUS LITIGATION, IN A WRONG FORUM ABOUT NOTHING: WHEN LAWYERS AND EXPERTS COLLUDE

Motswai v RAF 2012 SA (GSJ) Case No: 2010/17220

1 Introduction

The case of *Motswai v RAF* (2012 SA (GSJ) Case No: 2010/17220, not yet reported) is a clear indication of how lawyers and experts should not act in a case against the Road Accident Fund (RAF). From the facts of the case it is clear that there was no need to institute an action, yet the lawyers proceeded and experts even wrote lengthy opinions on a bruised ankle. The only inference the judge drew from this was that the lawyers (and experts) were only concerned about being paid even if it meant being paid from the funds intended to compensate road accident victims. Satchwell J therefore after analysing all the evidence made a cost order that neither the plaintiff's nor the defendant's attorneys should receive any fees at all in respect of this claim or litigation (par 90). The expenses incurred in respect of "experts" should not be a burden on the public purse and therefore the attorneys should meet these disbursements *de bonis propriis* (par 90). She further stated that counsel should be paid only on a scale of the Magistrate's Court and it should not include trial fees (par 92).

2 The Road Accident Fund

The objective of the RAF is explained in section 3 of the Road Accident Fund Act 56 of 1996 as the payment of compensation in accordance with the Act for loss or damage wrongfully caused by the driving of motor vehicles. In *Law Society of South Africa v Minister for Transport* (CCT 38/10 [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (25 November 2010) Moseneke DCJ said (par 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." This view is how it should be but in the case *in casu* Satchwell J remarked the following concerning the RAF: "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 by the RAF and the road accident victims" (par 1).

Section 5 of the Act determines that the Fund shall procure the funds it requires to perform its functions from (a) a Road Accident Fund levy [a fuel

levy] as contemplated in the Customs and Excise Act 911964 and by (b) by raising loans. The Road Accident Fund Amendment Act 19 of 2005 came into effect on 1 August 2008. This Act limits the RAF's liability for compensation in respect of claims for non-pecuniary loss (general damages) to instances where a "serious injury" has been sustained. In order to determine whether a serious injury was sustained the procedures in the Regulations to the Act (Notice 770 *GG* 31249 of 2008-07-21) need to be followed which prescribes that a medical practitioner has to prepare a RAF4 report (s 17 (1A) of Act 56 of 1996, http://www.raf.co.za; see also Slabbert and Edeling "The Road Accident Fund and Serious Injuries: The Narrative Test" 2012 *PER* 15(2) 268–290). When compiling the RAF4 report the medical practitioner must first make sure that the injury is not on the list of non-serious injuries (s 3(b)(i) of the Regulations). Such a list does not currently exist. Secondly the practitioner must assess the injury in term of *the American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition*. If the injury has resulted in 30 per cent or more impairment of the whole person, the injury is assessed as serious.

If the injury is not reported on the non-serious injuries list, and is assessed as less than 30 per cent whole person impairment the practitioner should apply the narrative test. According to this test the medical practitioner should consider if the injury has resulted in any of the following consequences: "serious long-term impairment or loss of a body function, permanent serious disfigurement, severe long-term mental or severe long-term behavioural disturbance or disorder or the loss of a foetus" (Slabbert and Edeling 2012 *PER* 15(2) 270). After the completion of a RAF4 report, it should be submitted to the RAF where members of the administrative staff review it and decide whether or not to accept it.

In the Motswai case there is no indication that the RAF acted in terms of section 24(5) of the Act which entitles the RAF, within 60 days, to object to the validity of a claim. There is also no indication that the RAF acted in term of Regulation 3 which entitles the RAF to require a Serious Injury Report (par 82). It seems that what happened with this case is exactly as the judge contemplated in the first paragraph of her judgement. According to her this litigation in Motswai was for the sole benefit of and enrichment of those "facilitators" of access to road accident compensation. She refers to another judge whom described these facilitators as "carnivorous" she goes further and labels them as "predatory" (par 2).

3 The facts of the *Motswai* case

Litigation was instituted on behalf of a so-called victim of a road accident (par 3). Mr Motswai, a packer who worked only three days a week, was a pedestrian injured in a motor vehicle accident on 24 August 2008 in Soweto, Johannesburg (par 6). In 2009 a Third Party Claim Form (RAF1) was served on the RAF claiming compensation (no mention is made of a RAF4 report). A medical report was attached to the RAF1 indicating that Motswai injured his right ankle, it was swollen with a soft tissue injury, but no permanent disability was expected (par 6). In 2010 a summons was issued against the RAF claiming R390 000 plus costs on behalf of Motswai. The particulars of claim averred that the plaintiff (Motswai) sustained severe bodily injuries by

means of a fractured right ankle. It was further claimed that the plaintiff had undergone past medical treatment and would incur future medical and related expenses and he would be compromised in his earning capacity. He also endured unspecified pain and suffering, loss of amenities of life and disability (par 7). The RAF denied that it was liable as alleged in the summons and both parties proceeded to prepare for trial (par 9).

On the request of the plaintiff's attorney an orthopaedic surgeon examined Motswai and reported that he sustained a soft tissue injury of the right ankle which was conservatively treated by bandaging the ankle. A radiologist also reported no abnormalities of the right ankle (par 11).

In the court documents the plaintiff's attorney indicated that the right ankle was fractured (par 26) and they would call an occupational therapist and an industrial psychologist as "experts to give evidence on its behalf at the trial of the matter" but no report of either expert was in the file presented to the judge (par 14). The defendant (RAF) procured reports of an orthopaedic surgeon (8 pages), a radiologist (1 page), an occupational therapist (16 pages), and a psychologist (14 pages) (par 15).

Before the set trial, two advocates appeared on behalf of the parties before the judge in chambers informing her that that the case was settled out of court but there was one outstanding issue; namely, whether any sum of money should be paid to Motswai in respect of loss of earnings by reason of him having to attend physiotherapy (par 16). The judge determined within 30 seconds that there was no basis upon which any payment should be made to the plaintiff. If he required physiotherapy four years after the soft tissue injury of his ankle, he "is perfectly able to utilise the days of the week when he does not work to access such treatment" (par 16). After settling the matter of the physiotherapy the judge was presented with a typed Draft Order which stated that the RAF will be liable for 80% of the plaintiffs agreed or proven damages and that the defendant shall furnish the plaintiff with an undertaking for 80% of costs of future medical treatment which may be incurred (18). The Draft order concluded with an order pertaining to costs of the litigation. The RAF was required to pay Motswai's taxed or agreed party-party costs on a High Court scale including the costs attendant upon obtaining medico-legal reports (par 19).

4 Assessment of the case

As per Satchwell J a number of issues appear from this case. Most importantly that action should never have been instituted and no litigation should have been pursued, let alone to the High Court (par 20). The hospital records clearly indicated that Motswai suffered no more than a "swollen" and "tender" right ankle. X-rays indicated no fractures and a crepe support bandage was prescribed (par 23) yet a legal process proceeded up to the date of the trial.

4 1 Conduct of the lawyers

A very important requirement for admission as either an attorney or an advocate is to be a 'fit and proper' person (The Admission of Advocates Act

74 of 1964; the Attorneys Act 53 of 1979; and see also Slabbert "The Requirement of being a "Fit and Proper" Person for the Legal Profession" 2011 *PER* 14(4) 209–231). In order to be "fit and proper" a person must show integrity, reliability and honesty, as these are the characteristics that could affect the relationship between a lawyer and a client and the public or a lawyer and the court (Slabbert 2011 *PER* 14(4) 212). Reference is made to the case of *Vassen v Law Society of the Cape of Good Hope* ((468/96) ZASCA47; 1998 (4) SA 532 (SCA); [1998] 3 All SA 358 (A) (28 May 1998) (par 33)). In this case the attorney stole money by convincing an insurance company to pay the proceeds due under a life insurance policy to himself instead of to the beneficiary. The court ruled that he was not a "fit and proper" person to practice – "an attorney, as any officer of the court is an honourable profession which demands complete honesty, reliability and integrity from its members …" (see also Venter "'Greedy' Lawyers Punished: Six Struck off the Roll, Seven Suspended; must Repay Millions to RAF" 30 September 2011 *Pretoria News* 1; and Vos "Lawyers are 'Abusing' Road Accident Fund" 22 October 2009 *Citizen* 1).

Motswai's attorney should have known that there could not possibly be a claim based upon a "serious injury" as envisaged in the RAF Act and the Regulations (par 24). The claim as formulated – both to the quantum and the ratio – was unsupported by the facts. Yet the attorney for the plaintiff in his particulars of claim persisted in claiming general damages by reason of a "serious injury" (par 25). He even went further and specified the nature and extent of such injuries to be a "fractured right ankle" which is a fabrication and not the truth (par 26). The attorney also signed the particulars of claim on the basis that he 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". The attorney as an officer of the court therefore "knowingly prepared a court document containing unthruths which untruths were material to the court document" (par 28). The signatory to these court documents must either be an advocate or and attorney with the right of appearance in a High Court thus, an experienced person, this highlights the value to be ascribed to the signature. The signature also indicates that the attorney or advocate confirms that he or she has been scrupulous in preparing the pleadings (par 30). The judge reiterated that any reasonable legal representative first investigates whatever has been told to them by a client before entering into litigation (par 32).

Concerning the quantum of damages claimed, the judge was concerned about who will receive the money (par 53). Damages were claimed in the summons in the total amount of R390 000. This sum was then detailed under different heads. Past hospital expenses were claimed although the plaintiff never incurred such expenses as he was treated at a public hospital. There is also no reference in any document that further treatment was obtained or will be necessary nor has any possible future expenses been substantiated (par 51). The amount claimed for past loss of income was inexplicable as Motswai deposed to an affidavit stating that he was "unemployed" except for being a handyman/packer/general worker for three days a week and it was reported that he denies any loss of productivity at work as a result of the right ankle injury sustained in the accident (par 41). Motswai will thus according to the Draft Order in reality receive nothing. The

RAF also undertook to meet future hospital, medical and other health related expenses for which it is liable in terms of section 17 of the RAF Act. According to the Draft Order the merits were settled in an allocation of liability between the parties – the RAF was liable for 80% and Motswai liable for 20% of all health related expenses. But Motswai never required any medical treatment between the accident in 2008 and the trial in 2012 except for painkillers and bandages (par 47). No refund is therefore due to him. The judge pointed out that it is highly improbable that he would ever incur health costs as he will seek and receive treatment at a public sector facility at no cost to himself. She concluded that the apportionment of liability and hence of the undertaking was an irrelevance in this particular case and never involved any benefit to Motswai personally (par 51).

Why was the action instituted? Judge Satchwell answers this question by referring to the accepted litigation practice that “costs follow the result”. Therefore once the RAF is liable for any damages or loss sustained in any road accident the RAF is also liable for the costs occasioned by the victim in pursuing and proving such a claim (par 54). This is confirmed by the Draft Order that provides that “The defendant shall pay the plaintiff’s taxed or agreed party and party costs on the High Court scale ...” (par 55). What is alarming is that the victim’s attorney and advocate as well as the expert witnesses will be rewarded notwithstanding absence of payment to the victim (par 56). The plaintiff’s advocate argued that the Draft Order was a clear indication that the plaintiff has been successful but the judge was not convinced (par 59). As in actual fact there was no benefit to the plaintiff whatsoever out of this litigation.

The unsettling part of this case is that the legal representatives are the only people 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 also 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” (par 61). The Draft Order also provided 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 …” (par 62).

4 2 RAF administrators

The RAF administrators and attorneys were also critiqued. They appear to have been “supine” and “uncritical” with the handling of the claim (par 78). The RAF1 form included a claim for non-pecuniary loss based on serious injury yet there was no serious injury as only the plaintiff’s ankle was swollen. No assessment report was added to the RAF1. The RAF administrators did not realise this (par 79). “One must question whether a RAF claims handler even read the claim form and medical report attached thereto.” The RAF administrators also did not notice the discrepancy in the nature of the injury recorded in the RAF1 claim and the hospital records and the injury explained in the particulars of claim (par 84). Despite this they

procured reports from an orthopaedic surgeon, a radiologist, an occupational therapist and an industrial psychologist (par 85). The judge questioned the rationale for seeking such expert opinions as it is difficult to understand it both in law and in common sense (par 88).

4 3 Experts

Grobler defines an expert witness according to the Society of Expert Witnesses in the United Kingdom as:

> "anyone with special knowledge, skill, experience, training or education in a particular field or discipline that permits them to testify to an opinion that will aid the judge or jury in resolving a question that is beyond the understanding or competence of laypersons" (Grobler "The Role of the Expert Witness" March 2007 *The South African Gastroenterology Review* 11; see also Zeffertt and Paizes *The South African Law of Evidence* 2ed (2009) 321–330; and Zeffertt and Paizes *Essential Evidence* (2010) 103–107).

Meintjes-Van der Walt argues in favour of a Code of Ethics for forensic experts and proposes ethical guidelines that should be contained in such a Code (Meintjes-Van der Walt "Ethics and the Expert: Some Suggestions for South Africa" October 2003 *CARSA* 4(2) 42). The reason why she proposes such a Code is because expert witnesses are reimbursed for their services and can therefore say what is needed to be said in order to win the case (see also Meintjes-Van der Walt "Science Friction: The Nature of Expert Evidence in General and Scientific Evidence in Particular" 2000 *SALJ* 117 771). Expert witnesses are supposed to provide independent assistance to the court by way of objective and unbiased opinion (Carter "On Neutral Ground: Expert Witnesses are not Guns for Hire" May 2011 *Casebook (MPS)* 19(2) 7–9). Carter refers to the case of *Schneider NO v AA* (2010 (5) SA 203 (WCC)) which is not a medical case but in which the Judge said concerning expert evidence:

> "an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party … But that does not absolve the expert from providing the court with an objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case (Carter May 2011 *Casebook (MPS)* 19(2) 8–9).

In *Michael v Linksfield Park Clinic (Pty) Ltd* (2001 (3) SA 1188 (SCA)) the principles of expert evidence were set out by Howie, Farlam JJA and Chetty AJA. Briefly it could be summarised as: "what is required in the evaluation of such [expert] evidence is to determine whether and to what extend their opions advanced are founded on logical reasoning" (See also Nondwana "The Role of Expert Evidence" 27 July 2012 *Legal Magazine* http://www.legalcity.net/Index..cfm?fuseaction=magazine.article&ArticleID=8104035 accessed 2013-01-15).

The *Motswai* case did not proceed to a trial in court as a settlement was reach on the day of the trial and a Draft Order was presented to the judge in chambers. The remarks above focuses on expert evidence during a trial, yet, the judge in the *Motswai* case saw it fit to address the "expert enrichment" as

a separate heading. The Draft Order indicated that the RAF should be responsible for "the costs attendant upon the obtaining of the Medico-Legal reports and/or preparation fees and or joint minutes if any as allowed by the Taxing master of the following two experts [the orthopaedic surgeon and industrial psychologist used by the plaintiff] (par 62). These two witnesses' "expert" status was not questioned as the judge remarked they regularly appear in the High Court as "expert witnesses" (par 63). What she did question was whether any of the experts consulted Motswai or read the hospital's report. The judge indicated that an opinion by an expert 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 were none (par 64) as the plaintiff's ankle was merely bruised, and no orthopaedic surgeon's report was necessary, yet, he prepared an eight page report being aware that his report revealed nothing more than "tenderness" and then only "on palpation" (par 66-68).

The orthopaedic surgeon for the RAF indicated that he did not think Motswai needs any treatment. The purpose of obtaining further reports from either or both the occupational therapist and/or industrial psychologist are thus inexplicable (par 87). The occupational therapist prepared a 16 page report which dealt with social circumstances etc but Motswai himself said there was "no difficulty in performing work duties other than cramping in the right leg with heavier lifting tasks" (par 87). The psychologist prepared a 14 page report dealing with family issues, Motswai's career etc, while the sum 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" while she knew that Motswai lives with a chronic illness as he disclosed this information to all medical practitioners who examined him (par 87). Obtaining these reports had no other function than to escalate fees (par 88).

It is clear from the facts and the reasoning of the judge that the experts failed their duty and did not exercise a professional discretion (par 70). They should have pointed out to the lawyers that there is no case and definitely no need for an expert report. The adverse effects of such conduct are not repairable. These experts will never be seen in the same light should they appear before the same judge at a future date, other judges may also be influenced by the reported case and not value their opinions any more. Satchwell J also indicated that a copy of the judgement will be send to the Health Professions Council (Order 4) which might have negatives consequences for the professionals involved. Hopefully by reading the case other experts might be alerted to the fact that giving evidence as an expert is not just for the money but it is a huge responsibility which ultimately is to the court and not to the party he or she is representing.

4 4 Costs

The judge failed to understand why the Draft Order provided that costs should be paid "on the High Court scale" when the outcome justified only costs on a Magistrate's Court scale. She ended by saying that neither the plaintiff's nor the defendant's attorneys should receive any fees at all in respect of the claim or litigation (par 90). She went further to say that the

public (by way of the fuel levy) should not bear the burden of payment to the experts and concluded that the attorneys should meet these disbursements *de boniis propriis*.

5 Conclusion

Grobler (March 2007 *The South African Gastroenterology Review* 11) refers to a Harvard Law Report of 1897 that made reference to an attorney that would have said: "gentlemen of the jury, there are three kinds of liars: the common liar, the damned liar and the scientific expert!" Sadly his own profession (some lawyers!) could be added to this unflattering comment in the light of the case discussed above. The attorney for the plaintiff were lying blatantly by changing a bruised ankle to a fractured ankle, the advocate did not clarify the issue but proceeded as briefed. The administrators of the RAF also did not apply their minds but proceeded with the case and agreed to a settlement. This is clearly not how "fit and proper" persons are expected to act especially considering that public money is involved.

The judge acknowledged that neither the plaintiff's nor the defendant's attorneys were alerted to the possibility of a *de bonis propriis* and are therefore given a chance to make submissions in this respect to her at another hearing (par 91) but she did inform the Law Society of the Northern Provinces concerning her judgement (Order 4).

Maybe the route forward for using experts is a Code of Ethics as proposed by Meintjes-Van der Walt, alternatively the example of the United Kingdom could be followed by introducing new Civil Procedure Rules requiring the courts to control the leading of "expert" evidence (par 72). This could even be made applicable to settlements out of court.

> "In that jurisdiction experts are reminded of their duty to help the court which duty overrides any obligation from the paymaster; the expert seeks direction from the court and the expert is required to depose to an affidavit in which he or she records the undertaking 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" (par 72).

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