

AN ATTORNEY'S LEGAL DUTY TOWARDS A THIRD PERSON

Road Accident Fund v Shabangu 2005 1 SA 265 (SCA)

1 Introduction

The recent decision in *Road Accident Fund v Shabangu* (2005 1 SA 265 (SCA)) has prompted us to revisit the attorney's legal duty towards a third person (see Cloete "Guard Against Disappointed Beneficiaries: The Will-drafting Duties of Legal Practitioners" 2003 *TSAR* 540-545). In this matter the respondents were a firm of attorneys. They lodged a claim with the Road Accident Fund (RAF) for compensation in terms of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 on behalf of a client who pretended to be the widow, and mother of the children, of a man who she said had died in a collision between two motor vehicles. The Fund settled the claim and the respondents, duly instructed by the client, signed a discharge form. The settlement amount was paid into the account of the respondents and was dealt with thereafter in accordance with the instructions of the client. It later appeared that the client was an impostor and that in fact even the deceased's dependants had no claim against the Fund, since no other vehicle had been involved in the accident which caused his death.

The Fund pursued its claim on a number of bases. In this note, however, we shall focus only on the attorney's negligence in failing to ascertain the true identity of their client when they submitted the claim. The question is whether the act or omission relied upon was wrongful, that is, whether the respondents owed a legal duty to the Fund; for if they did not, they would not be liable to the Fund and the inquiry into negligence does not arise.

Despite the court's finding that the respondents had no such legal duty, it is submitted that the decision did not open the door for practitioners to act recklessly.

2 The *Shabangu* decision

The RAF's argument in this matter was that the respondents had tacitly warranted the identity of the claimant. Cloete JA rejected this argument and held that there was no factual basis for finding that if the client was an impostor, the respondents tacitly undertook liability to the Fund for any damage which the fund might suffer. An attorney who submits a claim on behalf of a client does not tacitly warrant the client's *locus standi* to make the claim any more than the attorney tacitly warrants the truth of the acts on which the claim is based (270C-F par 7).

The Fund further submitted that the respondents had negligently misrepresented to the Fund that they acted for the true widow, that the respondents were negligent in failing to ascertain the true identity of the client when they submitted the claim and that they were negligent in failing to ascertain the true identity of their client before paying over the settlement amount on her instructions (see 271C-D par 10). These submissions necessitated an enquiry into the question whether an attorney can owe a legal duty to a third person whilst carrying out the instructions of a client (with regard to an omission, see *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1054H; and *Gouda Boerdery BK v Transnet Ltd* [2004] 4 All SA 500 (SCA) 507c-e).

Referring to the English decisions in *White v Jones* ([1995] 2 AC 207 (HL(E))); and *Ross v Caunter* ([1980] 1 Ch 297), Cloete JA stated (271G par 11) that the attorney-client relationship imposes a duty on an attorney to advance the interests of his client, *even where that course will cause harm to the opposite party* (own emphasis). This uncompromising view was softened (271J par 11) when Cloete JA said that an attorney is not entitled nor obliged to advance his client's interests at all costs. However, he then continued to state that it is not part of an attorney's functions to protect the interests of the opposing party.

According to Cloete JA (272B par 12) it is impossible to lay down an all-embracing test as to when an attorney will be held to owe a legal duty towards a person other than the client, since the question of wrongfulness is essentially one of legal policy (see *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A); *Minister van Polisie v Ewels* 1975 3 SA 590 (A); and *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA)). Cloete JA recognised that it is established in the jurisprudence of other countries that an attorney can be liable to a person with whom that attorney is not in a contractual relationship (272D-J par 13, citing *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA), *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC 465 (HL(E)), *Kamahap Enterprises Ltd v Chu's Central Market Ltd* [1990] 64 DLR (4th) 167, *Connell v Odlum* [1993] 2 NZLR 257, *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZAR 282, *Hill v Van Erp* [1996-1997] 188 CLR 159 and *Dean v Allin & Watts* [2001] 2 Loyds Rep 249 (CA)). The judge found this to be the position in South Africa as well (273F-G par 15, citing *BOE Bank Ltd v Ries* 2002 2 SA 39 (SCA)). However, he stressed that reasoning by analogy can be dangerous. He stated (273G-H par 15) that even where cases are identical, today's decision is not necessarily a reliable precedent for tomorrow's case as the position is susceptible to change in accordance with the barometer of society's norms and values (see *Pretorius v McCallum* 2002 2 SA 423 (C); *Ries v Boland Bank PKS Ltd* 2000 4 SA 955 (C); and Cloete 2003 TSAR 540-541 for a discussion on the attorney's legal duty towards third parties).

With reference to the facts in *Shabangu*, Cloete JA stated without qualification that the respondent owed no legal duty to the Fund to ascertain whether their client was indeed who she purported to be. It was further held (273J par 16) that the powers and functions of the Multilateral Motor Vehicle Accidents Fund included the investigation and settling of claims arising from

loss or damage caused by the driving of a motor vehicle where the identity of neither the owner nor the driver of the vehicle could be established. The investigation contemplated in the legislation included no less the *locus standi* of the claimant, and therefore the claimant's identity, than the merits and *quantum* of the claim. Cloete JA argued (274G-H par 17) that if the Fund relies on attorneys to bring claims under the Act to verify the identity of claimants, it is not entitled to hold those attorneys liable for damages, even if they were negligent. The Fund is also entitled to assume that an attorney is not a party to any fraud, but the same applies to an attorney in relation to the client. Therefore, an attorney is not obliged to treat a client with suspicion and obtain independent corroboration for the client's instructions before submitting the client's claim or before paying over the amount of a settlement. However, Cloete JA stated (274I-J par 18) that circumstances may arise where an attorney is actually put on his guard and an attorney would then be obliged to make further enquiries before submitting a claim (see *R v Myers* 1948 1 SA 375 (A) 382).

A subjective test must be applied in order to determine such a duty, because it was the function of the RAF to investigate claims and a "reasonable man" objective test would tend to shift the RAF's statutory investigative function to the attorney and undermine the attorney-client relationship (275D-E par 18). Invoking the well-established test laid down in *Kruger v Coetzee* (1966 2 SA 428 (A) 430E-F), Cloete JA held (275E par 19) that even if the respondents did owe the RAF a legal duty, there was no negligence. The court's conclusion was therefore that the claim by the RAF could not succeed, since the RAF had not established that the respondents owed it a legal duty to ascertain that the claimant was in fact the person whom she held herself out to be.

3 The duties of an attorney

Lewis (*Legal Ethics* (1982) 90) emphasises that in taking instructions the attorney must be reasonably satisfied of the clients' identity and any failure in this respect could be construed as negligence. However, Lewis argues that misconduct will only arise "if the failure has the sting of impropriety inherent in recklessness or indifference to duty". If one is suspicious or in doubt about the identity of the client or if the matter is of such importance, attorneys should require special identification.

The duty owed by an attorney towards his opponent is aptly dealt with by Van Zyl (*The Theory of the Judicial Practice of South Africa* (1921) 42). According to him, an attorney is not bound to do whatever his client wishes him to do. Even if an act or transaction may be to the client's advantage, but it is tainted with fraud or in any way dishonourable, the attorney should have nothing to do with it. The law expects an attorney to act with the highest possible degree of good faith. He must always manifest an inflexible regard for truth. An attorney should not accept a case which he knows from the outset to be unjust and unfounded. If during the course of a case the attorney discovers it to be such, he must abandon it at once.

According to *Ross v Caunters* ([1979] 3 All ER 580 599b-c) the attorney's duty towards his client is, in broad terms, to do all for him that he properly

can, with proper care and attention. However, an attorney owes no such duty to third parties who are not his clients and is therefore not the guardian of their interests. The services rendered by an attorney to his client may be hostile and injurious to the interests of third parties; “and sometimes the greater the injuries the better he will have served his client”.

4 Wrongfulness (breach of legal duty) and fault

4.1 Wrongfulness

In *Administrateur, Natal v Trust Bank van Afrika Bpk* (1979 3 SA 824 (A) 832) Rumpff CJ explained the requirements for delictual liability based on the breach of a legal duty. According to the judge such liability could be founded in the extended application of the *lex Aquilia*. This means that both wrongfulness and fault are required. The fear of limitless liability can only be allayed if in any given case it is the task of the court to determine whether in the specific circumstances the defendant was under a legal duty not to make a misstatement towards the plaintiff, and also whether the defendant, in light of all the circumstances, took reasonable care to ascertain the correctness of his representation. There can be no unlawfulness in the absence of a legal duty.

According to Joubert (*Law of South Africa* Vol 8 par 20), conduct is wrongful if it either infringes a legally recognised right of the plaintiff or constitutes a breach of a legal duty owed by the defendant to the plaintiff. A legal duty may be imposed by statute or by the common law. In the latter instance the existence of a legal duty upon the defendant is dependent upon the particular circumstances of the case.

4.2 Fault

According to Joubert (*Law of South Africa* vol 8 par 20), the inquiry whether the plaintiff's right has been infringed or the defendant has contravened a duty resting on him is objective, since factors such as the defendant's state of mind, motives and the degree of care taken, are disregarded. These factors concern the presence or absence of *fault* on the part of the defendant.

In *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* (1984 2 SA 881 (A) 904D) Trollip AJA reiterated that it was authoritatively established by the Appellate Division in *Administrateur, Natal v Trust Bank van Afrika Bpk* (1979 3 SA 824 (A)) that a misstatement negligently made by a defendant that causes a plaintiff pure economic loss (that is, loss other than damage to his personal property) is actionable in our law in appropriate circumstances.

5 Comment

Against the background of the explanations of the duties of an attorney and of wrongfulness and fault quoted above (par 3 and 4), one can infer from the *Shabangu* decision that the respondents' saving grace was the absence of a legal duty towards the RAF and the fact that they were held not to have

acted either negligently or fraudulently. In order to ascertain whether an attorney does owe a legal duty towards a third person, one must examine the particular circumstances of each case (see the comments by Rumpff CJ in *Administrateur Natal* quoted in par 4 above). This recognised principle of our law was applied and once again confirmed by the court in *Shabangu*. It is submitted that the court's decision was correct, although it is submitted that it should be treated with great circumspection since it did not suddenly open the door for practitioners to act recklessly.

It must be pointed out that it is further of paramount importance that the utmost good faith must be shown by all practitioners. This must not only be seen in their dealings with their clients, but also between colleagues, the court, statutory bodies, *etcetera*. The proper administration of justice could not survive if the professions were not scrupulous regarding the truth (see Cloete and Van der Berg "Regspraktisyns se Plig Teenoor Hof en Verantwoordelikheid Teenoor Medepraktisyns" 2001 *Obiter* 236-240; *Ex Parte Swain* 1973 2 SA 427 (N); *Ex parte Cassim* 1970 4 SA 476 (T); and *Aarons v Law Society of Transvaal (Society of Advocates of Witwatersrand intervening)* 1997 3 SA 750 (T)).

The fact that practitioners should at all times act with integrity, must also be emphasised. Unfortunately legal ethics have become a misnomer. Measured by any standard, it is of great concern that there is a general decline in legal ethics. Reasons for the collapse undoubtedly vary. At its heart lies the avarice of attorneys. It is sad to admit to the fact that this is an incurable disease. One can only try and instil ethical values which ought to be non-negotiable and irrebuttable.

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