IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2009/49589

DATE:19/10/2011

In the matter between:

Tshabangu, Sydwell Nhlanhla Plaintiff

And

Road Accident Fund Defendant

JUDGMENT

WEINER J:

Introduction and background

1. In this matter I delivered judgment on the 18th of August 2011. Paragraph 4 of the order read as follows:

> "A *rule nisi* is issued calling upon the senior claims manager charged with this case and the defendant's attorneys to show cause on Thursday 25th of August 2011 at 10H00 before Weiner J as to why they should not pay the cost of this matter on the attorney and client scale *de bonis propriis*.'

2. The reason for the *rule nisi* being issued was based upon the way in which the preparation for the trial was conducted and the issue of the special plea raised by

the defendant. The defendant pleaded that in terms of section 17(1A) read together with regulation 3(1) "(the regulations") of the Road Accident Fund Amendment Act of 2008 ("RAF Act") the plaintiff did not qualify for compensation for general damages as the plaintiffs whole personal impairment ("WPI") was assessed at 8%. This was in terms of a medical report as well as an RAF4 form completed by Dr Morare in May 2009.

4. It was common cause that:

    a. The plaintiff's claim for general damages was based upon the "narrative" test (after an amendment filed on 12 May 2011);
    b. Plaintiff submitted three RAF4 forms in this regard on 28 June 2011, 27 July 2011 and 5 August 2011;
    c. Defendant did not comply with the regulations in objecting to such RAF4 forms.
    d. The special plea was filed on 8th March 2011 and never amended or withdrawn, even at trial;
    e. Identical special pleas have been raised by the defendant's attorneys, Kekana Hlatshwayo Radebe ("KHR"), on at least two previous occasions, in similar circumstances, and have been dismissed in this division by Claasens J in both instances.[1]

3. On the 25th of August 2011 argument was presented on behalf of the claims manager, Sipho Ledwaba ("Ledwaba") and on behalf of the defendant's attorney, Mr Moyana ("Moyana") of KHR in satisfying the *rule nisi*.

The evidence of Mr Ledwaba

[1] See *Smith and Another v Road Accident Fund* (case no. 47697/09) and *Mianbo v Road Accident Fund* (case no. 00322/10).

5. In an affidavit submitted by Ledwaba he stated the following:

    i. The defendant instructed KHR to defend the action on their behalf;
    ii. On the 8th of March 2011, KHR filed a plea to the plaintiffs claim;
    iii. A precedent was forwarded to all the defendants' panel attorneys during March 2011 as to how the special plea is to be framed when disputing entitlements to general damages in the event that there was no compliance with the regulations;
    iv. The special plea, although badly framed, was intended to dispute the plaintiffs entitlement to compensation for general damages;
    v. On the 12th of May 2011, the plaintiff amended his particulars of claim to allege an entitlement to general damages on the basis of the "narrative" test as opposed to the WPI assessment;
    vi. Further RAF4 forms were submitted by the plaintiff completed by Dr Sher (orthopaedic surgeon) and Ms. Doran (occupational therapist). These medico-legal reports were served on the defendant's attorney on 28 June 2011 and 27 July 2011 respectively;
    vii. In addition, on the 5th of August 2011, an addendum RAF4 form compiled by Dr Morare was submitted in terms of the "narrative" test. Dr Morare concluded that the plaintiff had incurred serious long term impairment to his right ankle.
    viii. The defendant's orthopaedic surgeon, DR RA Morule, had determined that the injury was not serious, in his report dated 3 June 2011.

6. Accordingly, by the 12th of May 2011, it was clear that general damages were claimed based upon the "narrative" test and not upon the WPI assessment. In

addition, the defendant's attorney has also received three medico-legal reports with the RAF4 forms in June, July and August 2011.

7. Despite that, on the 11th of August 2011, Moyana informed Ledwaba that he recommended that the question of liability be settled on an 80%-20% apportionment and that no amount be tendered in respect of general damages as the plaintiff would not qualify as the impairment was less than 30% of WPI.

8. This tender was confirmed by Ledwaba's senior manager, Mrs Marlize Joubert. Ledwaba claims that he heard nothing further from KHR until he received the letter dated 19th August 2011 annexing the court order in terms of which he was called upon to provide reasons why he should not be held liable for the costs.

9. It is pertinent to note that Ledwaba says he only received the 3 recent RAF4 forms on 11 August 2011.

Conduct of the defendant

10. It is clear from what was stated in the main judgment that the defendant failed to follow the proper procedures in objecting to the RAF4 forms provided by the plaintiff based upon the "narrative" test.[2] Despite this the defendant persisted with the plea that the plaintiff was not able to claim general damages based upon the fact that the WPI fell below the 30% threshold. Both the evidence of Ledwaba and that of Moyana demonstrate that they both failed to appreciate the difference between a WPI 30% RAF4 form claim and one based upon the "narrative" test.

11. At the hearing of the matter reference was made to judgments delivered by Claasens J. In *Smith and Another v Road Accident Fund* (case no. 47697/09),

[2] I dealt in the judgment with the procedure to be followed in assessing claims for general damages in terms of section 17(1A) read together with regulation 3(1) of the RAF Act.

which judgment was delivered on the 29th of April 2011, the defendant dealt with the RAF4 form by writing a letter two years after the RAF4 form was completed. In such letter, it stated simply that it rejected the assessment on the RAF4 form as the plaintiff had not reached MMI at the time of completion of the RAF4 form. Claasens J held that the objection was purely obstructive and not properly raised. Similarly, in *Mianbo v Road Accident Fund* (case no. 00322/10), handed down on the 29th of October 2010, Claasens J held that when the plaintiff filed a RAF4 form based upon the "narrative" test, it had in fact complied with the regulations and the special plea raised was dismissed.

12. In the present case KHR, on behalf of the defendant, delivered a letter on the 3rd of August 2011 referring to the plaintiffs RAF4 form submitted by Dr Morare on the 15th of May 2009. The basis of the objection was that the injury did not result in a 30% or more WPI. This objection was received more than two years after the original RAF 4 form was filed. It related only to the RAF4 form filed by Dr Morare and did not deal at all with the RAF4 forms filed by Dr Scher and Ms. Doran. The defendant accordingly did not comply with the procedure in terms of which it was obliged to act if it objected to the plaintiff's claim.

13. Despite this the defendant's counsel, on instructions from his attorney, persisted with the special plea which obliged the plaintiff to spend most of the hearing arguing the legalities of the special plea.

14. What is of relevance is that the two cases referred to above in which the same issue was raised and dismissed by Claasens J involved KHR as attorneys for the defendant.

Evidence of Moyana

15. In Moyana's evidence, he stated that :

a. Mrs Kekana, a director of KHR, had received instructions from the defendant sometime in 2008 that a special plea based upon non-compliance with the regulations should be raised. In matters where the plaintiff claimed general damages for an accident that occurred after 1 August 2008, where the claim did not meet the 30% WPI threshold;

b. Mrs Kekana gave that instruction to the employees.

c. He drafted the special plea in the present case. At he was not aware that a RAF4 form had been filed.

d. He was not at court on the day the trial proceeded but his colleague told him that he had called the Road Accident Fund for instructions. [This is disputed by Ledwaba who claims he heard nothing from the defendant's attorney on the day of the trial].

e. He was unaware of these previous judgments against KHR. Although he was not the attorney dealing with those matters, no one from KHR had informed him of this.

f. He was aware that Dr Sher and Ms Doran had filed RAF4 forms in June and July 2011.

g. His letter of objection to Dr Morare's report (filed in 2009) was delivered on the 3rd of August – a week before the trial. He confirmed that they objected on the basis that the plaintiff had not reached the 30% WPI.

h. Under cross-examination, he stated that they only object to RAF4 forms that do not meet the WPI 30% and do not object to the RAF4 forms that support the "narrative" test. However, despite the "narrative" test, the defendant could still persist with the plea, as the defendant's expert, Dr Morule did not believe that the plaintiff passed the serious injury test [Dr Morule was not called by the defendant to give evidence in opposition to plaintiff's experts] to confirm this.

i. However, he conceded that, even on this basis, the defendant failed to follow the correct procedure under Regulation 17, thus rendering the plaintiff's claim admissible, through the defendant's default.
j. The defendant had not objected to the RAF 4 forms received in June, July and August 2011. When he was asked why the defendant persisted with the special plea, he stated that it was not his call to withdraw the special plea without instructions.
k. He did not, from the time that he received the reports in June and July, attempt to get further instructions from the defendant.

16. On the day of the trial, despite persisting with the special plea, counsel for the defendant did not make any submissions refuting the plaintiff's legal argument on the special plea. In addition, the defendant failed to call any witnesses to dispute the evidence of the plaintiff's expert (in relation to whether the injury was serious or not) and offered no defence to the plaintiff's submissions regarding general damages.

17. It is clear that whether or not Moyana was aware that the RAF4 form had been timeously filed at the time the special plea was drafted, he became aware that plaintiff's claim was based upon the "narrative" test on 12 May 2011 and he received the RAF4 forms on 28th of June, 27 July and 5 August 2011. The defendant did not object to such RAF4 forms. Despite this, the defendant's counsel, on instructions from the attorney, persisted with the plea.

18. What further appears from the affidavit submitted by Ledwaba is that the RAF4 forms of Dr Sher and Ms. Doran which were filed in June and July were only sent to the Road Accident Fund on the 11th of August. There was no explanation from Moyana why the forms were only submitted to the Road Accident Fund on the 11th of August.

19. The Road Accident Fund should be able to give input when recommendations are made by their attorneys in regard to settling cases. It should not rely only on the opinion of their attorneys. However, this ability to give input would have been taken out of their hands in that they only received the forms dealing with the "narrative" test on the 11th of August. Thus when they accepted the recommendation of the attorney that they should not tender any amount for general damages, they were unaware of the RAF4 forms which had been filed based upon the "narrative" test.

20. It seems to me that there is a total lack of communication between attorneys who are briefed by the Road Accident Fund and the claims managers in charge of particular cases. It happens on virtually each occasion that a matter is called in the trial court that the parties are not ready to proceed because the defendant's counsel has not received proper instructions. Whether it is the attorney's fault for not keeping the defendant updated on a regular basis or the defendant's fault for not keeping abreast with the progress of the matter, is an issue which permeates the civil roll on a daily basis. The Road Accident Fund matters form the majority of the matters on the roll. Very few are fully contested; most are settled at trial or postponed because the parties (usually the defendant) has been dilatory in providing expert reports or offering a settlement.

21. If the communication between the defendant and its attorneys was regular, timeous and informed, these matters would, in the main, become settled, as they should, long before the trial date. This would enable the court's function to be exercised properly in the administration of justice and not as an "eleventh hour" power to force parties to get their house in order.

22. There are issues which should be dealt with at the pre-trial conference by which time the attorneys and counsel should have proper instructions in regard to the issues in the matter.

23. Furthermore, the defendant in many of these matters does not make an offer of settlement but compels the plaintiff to lead all of its witnesses and submit legal arguments. The defendant does not ask any questions of the plaintiff's witnesses, does not call any of its own witnesses and does not offer any substantial defence to the legal and or factual submissions made by the plaintiff's counsel. From the evidence which was led by Moyana, it appears that it has become common practice to simply raise the special plea referred to without any reference to the particular facts of the case in question. Whether or not an instruction has been received by the firm of attorneys from the Road Accident Fund, is not dispositive of the matter. An attorney has a duty to the court as an officer of the court to do more than simply use a standard form of plea.

24. Both Moyana and Ledwaba seemed to ignore the "narrative" test which forms the basis of the plaintiff's claim and stated that the special plea should be raised when the 30% WPI has not been reached. They both seemed to believe that that was applicable in the present case.

25. It is clear from the judgements of Claasens J to which I have referred above, that when the "narrative" test is used and the medical experts provide the factual basis for such test in determining that the injury is serious, the procedures in terms of regulation 17 have been correctly followed by the plaintiff. The defendant is then obliged to follow the procedures applicable if it objects. This, the defendant failed to do, but it persisted with its special plea.

26. The evidence of Moyana that he had not been given any information about the judgments which have been granted against his firm is both incredulous and of great concern to this court. It appears that KHR have continued to act in total disregard of such order, not even informing members of their staff that, in circumstances such as the present, such special plea should not be pleaded and/or proceeded with.

27. It borders on contempt of court that a firm of attorneys against whom several judgments have been granted on a particular issue continues to file the same plea and persist with it when it is not applicable in the particular circumstances of the case. This, more particularly, when the defendant has failed to comply with its obligations in terms of the relevant regulation.

Costs

28. In *Jwili v Road Accident Fund* [2010] JOL25488 (GNP), Southwood J referred to rule 37(9)(a)(ii) which provides: 'at the hearing of a matter the court shall consider whether or not it is appropriate to make a special order as to costs against a party or his attorneys, because he or his attorney - … (ii) failed to a material degree to promote the effective disposal of the litigation.'

29. Southwood J stated as follows:

> "[U]sually I would have great difficulty in accepting that the claims handler would not be available to provide instructions particularly on the morning of the trial but regrettably I must accept that it is not so improbable that it must be rejected. This is the third of the trials I was allocated on the 4th of May 2010. All involved claims against the Road Accident Fund. The first trial settled in the time it took for the advocates to walk from the roll call to my chambers and I was told that the defendants counsel had only just received instructions from the Road

> Accident Fund. The second trial settled minutes before I went into court once again because the Road Accident Fund had delayed giving its instructions. On both occasions I was told that the attorneys had had great difficulty in obtaining instructions from the Road Accident Fund. Nevertheless I considered that Mr Ntimbana's [the attorney] conduct of the case failed to a material degree to promote its effective disposal..... 'A legal practitioner has a duty to the court not only to his client and must not misrepresent facts to the court.....I am loath to make an order for costs against the defendant because of the conduct of its claims handler Mr Sibongele Dondashi but I am unable to find a way to make him liable for the costs of this hearing which have been unnecessarily incurred."

Failure to a material degree to promote the effective disposal of the litigation

30. In the present matter Moyana does not appear to have been as negligent as the attorney in the *Jwili* case. In addition, he was unaware of the judgments handed down against KHR. However, as stated above, the lack of proper and informed communication between Moyana and the defendant and the time that was wasted in compelling the plaintiff to present argument with regard to the special plea, is the responsibility of the defendant's attorney together with the defendant.

31. In the result I find that both the defendant and the defendant's attorneys, KHR, have 'failed to a material degree to promote the effective disposal of this litigation'.

Order

32. The order which I made on the 18th of August of 2011 stands save that paragraph 4 thereof will be amended to read as follows:

"4. The defendant and the defendant's attorneys Kekana, Hlatshwayo and Radebe Incorporated are ordered to pay the costs of this action from 12 May 2011 to date hereof jointly and severally the one paying the other to be absolved. The defendant is to pay the balance of the costs"

33. The registrar of this court is directed to send a copy of the judgment and this order together with copies of the pleadings to the president of the Law Society of the Northern Provinces to investigate the conduct of Kekana, Hlatshwayo Radebe in the light of this judgment.

DATED AT JOHANNESBURG THIS 19th DAY OF OCTOBER 2011

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Weiner J

Date of hearing: 25 August 2011

Date of judgment: 19 October 2011

Counsel for the plaintiff: Adv. Du Plessis

Attorneys for the plaintiff: Raphael Kurganoff Inc.

Counsel for the defendant (KHR): Adv. JF Roos SC

Attorneys for the defendant (KHR): Kekana Hlatshwayo Radebe Inc.

Counsel for the Road Accident Fund: Adv. Patel

Attorneys for the Road Accident Fund: Eversheds