IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER 2010/17220

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between

MOTSWAI, MUSEJIE VENNON **Plaintiff**

And

ROAD ACCIDENT FUND **Defendant**

SUMMARY: Costs of plaintiff and defendant attorneys in RAF matter – jurisdiction of court to change agreement on costs - judicial officers must be astute to ensure that public monies are not wastefully expended - costs incurred where injury upon which claim for damages based had not occurred - plaintiff attorney who signed particulars of claim does

not check the hospital records upon which claim based – argument that plaintiff's attorney entitled to rely upon plaintiff's own assessment of injury rejected - defendant attorney did not notice disparity between hospital records and particulars of claim - order made that plaintiff's attorneys may recover no fees and disbursements from RAF – defendant's attorneys may recover from RAF only own fees and radiologist and counsel's fees and must bear costs of other medical reports de bonis propriis.

JUDGMENT

SATCHWELL J:

BACKGROUND TO COSTS INVESTIGATION

1. By judgment handed down on 6th December 2012, the issue of recovery of fees and disbursements by both the Plaintiff's and the Defendant's attorneys was postponed to another date. The matter was argued on Friday 15th March 2013.

2. The original order arose out of an agreement of settlement entered into by the litigating parties which provided that the plaintiff was to receive an undertaking in terms of section 17 of the Road Accident Fund Act number 56 of 1996 (hereafter referred to as the RAF Act) for payment of 80% of plaintiff's future medical expenses and then set out the basis upon which costs (Plaintiff's fees and disbursements) would be met by the Road Accident Fund (hereafter referred to as the RAF).

3. In my earlier judgment I noted that the Baragwanath Hospital records of August 2008 diagnosed, after x rays, that Plaintiff had sustained a soft tissue injury to his right ankle for which "*RICE"* and painkillers were prescribed. This soft tissue injury was the medical basis of the claim as set out in the RAF Form 1 of July 2009. When summons was issued in May 2010, Plaintiff's damages were now, according to the particulars of claim, based upon a *"fractured right ankle"* . Radiology and

orthopaedic examinations undertaken a month before trial confirmed the earlier diagnosis of a soft tissue injury.

4. In my earlier judgment I found that there was no triable issue and that the litigation should never have been instituted. I castigated the Plaintiff's attorney for signing the particulars of claim which were clearly untrue. I deprecated the Defendant and the Defendant's attorneys for failing to respond professionally, or at all, to the discrepancy between the RAF Form 1 and the particulars of claim. I expressed disquiet that the orthopaedic surgeon who prepared a report for the Plaintiff had not directed the attorney's attention to the lack of a fracture and the absence of any need for a medico-legal report. I deplored the incurring of attorney and advocates costs as well as costs of '*medical experts'* in the circumstances of this case.

5. It was these concerns which caused me to make the orders that the parties' attorneys furnish the Senior Registrar of this court with copies of all invoices pertaining to costs in this litigation as well as arranging a hearing on the issue of costs *de bonis propriis*.

JURISDICTION OF COURT TO CHANGE PARTIES AGREEMENT ON COSTS

6. Relying upon *Laws v Rutherford 1924 AD 261*, counsel for the Plaintiff's attorney submitted that the court has no jurisdiction to 'rewrite' the agreement on costs entered into by the Plaintiff's attorney and the RAF.

7. Of course, *Laws (supra)* was concerned with failure to comply with " *an important condition*" and it was, in that context, that Innes CJ commented at 264 "*The Court cannot make new contracts for parties; it must hold them to bargains into which they have deliberately entered*". In the present case, the court is not concerned with a substantive contract between the parties.

8. The award of costs is a matter within the discretion of the court. Whether such award is encompassed within an agreement entered into by the litigants representatives or not, I know of no rule which requires a judicial officer to close

his or her eyes to the propriety the scale or quantum of costs merely because legal representatives have agreed same[1].

9. It is trite that the entire system of road accident compensation in South Africa is funded by a compulsory levy imposed by government upon petrol and diesel. This dedicated levy is paid, one way or another, by all road users. There is nothing voluntary about payment. This is pre-eminently a form of taxation in order to fund what is perceived to be a social good – road accident compensation. Every penny expended by the RAF is expenditure of public monies.

10. Judicial officers must be astute to ensure that public monies are not wastefully expended. This approach has been followed by our courts in matters involving road accident compensation – whether capital or costs are concerned.

11. It seems to me that it is even more essential that the court should carefully scrutinise costs arrangements between parties where it is clear on the papers that neither legal representative has been alert to ensure cost-effective litigation.

AGREEMENT INCORRECTLY RECORDED HIGH COURT COSTS

12. Counsel for both the Plaintiff and the Defendant's attorneys informed me that, although the agreement handed to me expressly stated that *"the defendant shall pay the plaintiffs taxed or agreed party and party costs on the High Court scale*" this had not actually been agreed between the parties.

13. The RAF had instructed its attorneys per email dated 13th December 2012 at 11h56 (i.e. during or after roll call on the trial date), that it would only pay costs on the magistrates court scale and the agreement which had been drafted by the counsel attorney appearing for the Plaintiff had neither been seen nor corrected by counsel for the RAF before it was handed to myself, the trial judge.

[1] See *Ferreira v Levin, Vryenhoek v Powell 1996(2) SA 621 (CC)* at paragraph [3].

14. Clearly, the RAF was alive to the need to distinguish between costs on different scales.

15. What concerns me is the assumption by the counsel attorney appearing for the Plaintiff that he could prepare a draft order, where no damages were payable which would justify (any) scale of costs, that provided for costs on the high court scale.

CIRCUMSTANCES OF INCURRING OF COSTS BY PLAINTIFF ATTORNEY

16. There are essentially five submissions made on behalf of the Plaintiff's attorney with regard to the incurring of costs in this matter.

17. First,, It is complained that I failed to refer to the specific pages of the hospital records which indicate the initial concern that there might be a fracture. This is incorrect – the judgment refers to pages 27 to 38 of the records which indicates that the hospital initially gave consideration to the possibly of a fracture of the right ankle and accordingly referred the patient for an x-ray which showed no fracture. The judgment specifically states *"x rays were taken and there were no fractures"* What was and remains relevant is that the hospital records excluded a fracture after investigation and found only a soft tissue injury.

18. Second, at the end of argument it was submitted that soft tissues injuries can be very serious because they "can include torn ligaments". That is neither here nor there. The litigation was not based upon serious soft tissue injuries which might include torn ligaments.

19. Third, it was argued that the Plaintiff informed his attorney at his initial consultation on affidavit and then at a later consultation that he had fractured his ankle and that the attorney was entitled to have regard to such complaint by the client in formulating the particulars of claim. That may be so but it takes the matter no further. Notwithstanding the belief by the client as to the nature of his injury,

the medical records do not support his misapprehension. He is, after all, a layperson. If the attorney took the view that the clients's assessment of his injury was more likely to be accurate than that contained in the hospital records, then the attorney could and should have called for further x-rays and/or examination before incorrectly stating the basis of damages in the particulars of claim. It is difficult to comprehend upon what basis an attorney could elevate a layperson client's view above that of medical examination and records.

20. Fourth, it was explained to me that the process adopted in the office of the Plaintiff's attorney is such that it is the articled clerk or the candidate attorney who is responsible for consultations, investigation, perusal of documentation, preparation of particulars of claim. This is not the purview of the attorney under whose name the litigation is instituted. In the attorney's affidavit, he states that he does not have an independent recollection of this specific matter and points out that the *"probabilities dictate that I did not personally deal with this matter at its inception as it is normally dealt with by the more junior members of my firm."* He does, however, describe the process that is followed in all new claims:

> *"A consultation will be arranged with a new client at which stage a statement is taken from him or her. …. It is …probable that the plaintiff in this instance either arrived with his hospital records at the first consultation or that he provided us with these records at a later stage. ….. A RAF1 medical form will be completed and this will be lodged with the Road Accident Fund together with all the necessary supporting documentation. The RAF then has 4 (four) months to consider the claim. Invariably, no offer of settlement is made and summons is then issued…. … In this particular instance the particulars of claim was drawn by Lauren Whittle who, at that time, was a candidate attorney with my firm. At that stage she would have had the hospital records as well as the Plaintiff's affidavit (and probably also the Accident Report Form) as the source documents from which the particulars of claim were drafted. The Plaintiff alleges in his affidavit that he sustained "a broken right ankle" in the collision. Whittle would have seen on pages 29 and 36 of the hospital records… that there is reference to a fractured right ankle and a fracture of the right foot respectively. I can only surmise that Whittle did not analyse pages 37 and 38 (part of the hospital records) of the said bundle of documents in detail and that this is the reason why the particulars of claim contain the reference to a "fractured" ankle….. The procedure followed in our firm when summons is issued is that a candidate attorney or professional assistant would draw the particulars of claim and I would then check the format thereof. I do not refer back to the hospital records as this is too time-consuming. … I signed*

> *the particulars of claim after I satisfied myself that the correct format was used."*[2]

Based on the aforesaid, heads of argument were submitted to the following effect:

> *"The plaintiff is interviewed by a candidate attorney. The hospital records are obtained. During the first interview the plaintiff informs the candidate attorney that he has broken his ankle. On receipt of the medical file, the candidate attorney draws the particulars of claim with reference to the hospital records and what she has been informed by the plaintiff. These particulars of claim are then taken to Krynauw to check and sign. He does not check whether the candidate attorney has correctly interpreted the hospital records or her instructions from the client as this is the work of the candidate attorney. He checks that all the averments that have to be made are made."*[3]

I understand both this explanation and the argument to be that it is the candidate attorney who is responsible for the content of pleadings and that the admitted attorney, who is principal to the candidate attorney, does not take responsibility for the accuracy of pleadings. I believe that the relationship and obligations of principal to candidate attorney are matters on which the Law Society is best able to comment.

21. Fifth, it was submitted that the claim for general damages based upon the 'fracture' did not refer to a 'serious injury' as provided for in the RAF Act because the amendment to the Act which limited general damages to serious injuries was under challenge at that time. The particulars of claim and summons were signed on 30th March 2010 and a judgment of Fabricius J was handed down on 31 March 2010[4]. It was submitted that it would have been "highly irresponsible" not to have claimed general damages notwithstanding that there had not been a 'serious injury' as appears in the Act. I am of the view that, although the amendments to the Act may have been under challenge, what is relevant is that the particulars of claim referred to "*severe bodily injuries*" and a "*fractured right ankle"* - neither of which was correct.

22. Sixth,, the attorney set out that the procedure in his office *"after the summons had been issued and the exchange of pleadings had been completed, is to obtain medico-*

[2] Extracts from paragraphs 8.1 to 13 of affidavit of Mr Krynauw.
[3] Extracts from paragraphs 12.4 of plaintiff's heads of argument.
[4] I was not furnished with the reference to or citation of this judgment.

legal reports only once a trial date has been allocated"[5] . It was submitted in argument that it cannot be suggested that the plaintiff should not have been referred to an orthopaedic surgeon and an industrial psychologist (and perhaps an occupational therapist because notice was given in terms of rule 36(9)(a) that 'Adri Roos (occupational therapist) would be called to give evidence[6]) because *"it cannot be suggested that the attorney should assess the injury and make the decision as to whether the plaintiff may be less employable in the future that he may have been.*"[7] It was argued that "*It is not for an attorney to decide on medical matters. He has a client who complains that he has a fractured ankle and there is reference in the medical reports thereto. …. A person who fills in a RAF1 from merely relies on these hospital records*."[8] This argument misses the point. It has never been suggested that an attorney should determine the nature and extent and *sequelae* of the injury sustained by this plaintiff or any other. What is of great concern is that the first medical diagnosis was ignored. If regard had been had thereto, there would have been no need for the many expert reports.

23. In the course of argument I struggled to obtain two concessions or agreements from counsel. The first is that that the Baragwanath hospital records were clear that there was no fracture. The second is that the attorney who signed the particulars of claim had done so without regard to the foundation (ie the claimed fracture) which gave rise to the particulars of claim which he was signing. Both concessions were eventually made.

CIRCUMSTANCES OF INCURRING COSTS BY DEFENDANT ATTORNEYS

24. The affidavit of the Defendant's attorney and submissions of counsel focussed on the need to commission various medico-legal assessment and reports prior to the trial in 2012. The attorneys affidavit states no more than that

[5] Paragraph 16 of Mr Krynauw's affidavit.
[6] Notice dated 10th October 2012.
[7] Paragraph 16 of plaintiff heads of argument.
[8] Extract from paragraph 16.1 of plaintiff heads of argumens.

> "*we were instructed to defend the said action on behalf of the Defendant. On 25 June 2012, a letter was sent to the plaintiff's attorneys of record enquiring whether they had intended to send the plaintiff for any medico-legal assessment in this matter. It is apparent on the summons that the plaintiff had sustained a fractured ankle. …… We did not receive any response to the letter. On 09 July 2012, we started securing medico-legal appointments for the plaintiff to be assessed by various medical-legal doctors. It is practice that where the plaintiff has claimed for general damages and loss of income, that we appoint the relevant expert in the field."*[9] *"in my opinion, it had been prudent to protect the Fund's rights in order to rebut any case levied by the plaintiff, as clearly in this matter, if the defendant had only started acting in October 2012, when it received the plaintiff 36 9 (a) it would have been too late, to secure appointments, from the opposing experts."*

In response to my several questions, counsel reiterated that the claim "had to be properly investigated".

25. I questioned whether the two affidavits now presented by the defendant's attorneys gave any indication that anyone in the employ of the RAF had ever read the RAF claim form which stated there was no fracture? I questioned whether anyone in the employ of the RAF had ever read the particulars of claim which averred that there was a "fractured right ankle"? I questioned whether anyone in the RAF had drawn the notice of the attorneys to the discrepancy between the RAF form and the Baragwanath hospital records on the one hand and the particulars of claim on the other? I accept that counsel was not appearing for the RAF and was unable to answer these questions.

26. I then enquired whether the attorney who was representing the RAF had noticed the disparity between the RAF claim form and the Baragwanath records on the one hand and the particulars of claim on the other hand? The answer was that the attorney had not noticed.

27. This answer rendered my further questions whether the defendant's attorney had taken any steps to terminate or limit the litigation somewhat irrelevant. I asked whether the defendant's attorney had written to the Plaintiff's attorney pointing out that the medical records and the RAF claim form did not support the particulars of claim? I asked whether the defendants plea had challenged the plaintiff's claim by specifically stating that the claim was disputed because the medical documentation contradicted the averments in the

[9] Extracts from paragraphs 6 to 9 of Mr Sishi affidavit.

particulars of claim? There could be and was no positive answer to these questions. All that was repeated was that these claims "had to be properly investigated".

28. Nothing has been advanced to suggest that the Defendant's attorneys perused the hospital records, the RAF claim form or the particulars of claim. On 14th September 2010 the Defendant's plea was signed and the only response to the averment of "severe bodily injuries"[10] of "fractured right ankle"[11] was to deny *"knowledge of the allegations contained herein, accordingly cannot admit same and puts plaintiff to the proof thereof."* In short, the Defendants plea failed to challenge the incorrect averment which was apparent to the Defendant and it's attorney on the documents and actually invited further litigation by requiring the Plaintiff to prove these averments.

29. Some two years after receipt of summons in May 2009, the Defendant's attorneys decided to obtain certain assessments and reports in July 2012. The orthopaedic surgeon confirmed what the attorney had not noticed – there never had been a fracture. Yet counsel submitted that it "was in the interests of the RAF for the attorney to be proactive in getting medical-legal reports".

30. There is nothing proactive about waiting two years and still failing to check the hospital records and the RAF claim form. There is nothing proactive in failing, during this two year period, to draw the Plaintiff's attorneys attention to the contradiction between medical opinion and the claim. There is nothing proactive about failing to act in terms of Section 24 of the Act. There is nothing usefully proactive about commissioning reports from an occupational therapist and an industrial psychologist when an unemployed plaintiff has sustained a soft tissue injury to the ankle.

31. It was argued that the claim for loss of income remained alive to the day of trial. There is nothing before me to suggest that anyone cast a professional legal eye over this claim and evaluated the merits of incurring the costs of an occupational therapist, an industrial psychologist, an attorney and an advocate when the claim had reduced to approximately fifteen hundred rand (R 1500) in respect of time off from part time work to obtain physiotherapy.

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[10] Paragraph 5 of particulars of claim.
[11] Paragraph 6.1.1 of particulars of claim.

COSTS INCURRED

32. Pursuant to my order of 6th December 2012 I have been furnished with documentation giving some indication of the legal costs incurred. These are in respect of disbursements only.

33. The Plaintiff's attorneys have furnished the following documentation:
    a. Industrial Psychologists Ben Moodie (consultation, evaluation and assessment) - R 8,950,00
    b. Radiologists Drs Matisonn et al (x rays and report) - R 746.20
    c. Orthopaedic Surgeon Mr G. Read (examination and report) - R 18 240.00
    d. Attorney C Pottinger (brief on day of trial) - R 2 250,00
    e. Occupational Therapist Adri Roos – no invoice submitted.

34. The Defendant's attorneys have furnished the following documentation:
    f. Radiologist Dr Bloch (x rays and report) - R 1 250,00
    g. Orthopaedic Surgeon Mr JJ Van Niekerk (examination and report) R 8 326.00
    h. Occupational Therapist Megan Spavins (assessment and report) – R 7 900.00
    i. Industrial Psychologist Lance Marais - costs claimed directly from RAF
    j. Adv T C Tshidada (brief, consultation with attorney, preparation, appearance at court) - R 6 500.00

35. I have received no information as to fees charged by either of the firms of attorneys in the course of this litigation. I would suspect that the Plaintiff's attorney has acted without recompense awaiting successful finalisation of the matter. However, it may be that the Defendant's attorneys have submitted interim statements of accounts for services rendered. However, I failed to ask for such documentation and it was not provided.

36. It is remarkable that in excess of R 50 000 (fifty thousand rand) of public monies has been expended on disbursements alone where there was no more than a "soft

tissue injury" to an ankle and no damages are to be paid over to the road accident victim.

CONCLUSION

37. Advocate van der Walt, who appeared for plaintiff's attorney, vehemently argued that a great injustice had been done by myself to the Plaintiff's attorney, Mr Krynauw. Mr Krynauw was not given an opportunity to be represented or to respond to the criticisms of himself prior to preparation of my judgment which was marked 'reportable' and has received much publicity . This injustice is all the greater because, so argued Mr van der Walt, my judgment was based upon an incorrect analysis of the facts and all the facts were not before the court when the judgment was written.

38. Mr van der Walt strongly argued for absence of any fraudulent intent on the part of plaintiff's attorney. Notwithstanding that which is stated in both the attorney's affidavit and Mr van der Walt's heads of argument, negligence was not conceded.

39. Since the matter was heard in my chambers – it being presented mainly on the basis of making a settlement agreement an order and there being a shortage of civil courtrooms during that week - there is no record of the proceedings in chambers. I do not disagree with the recollections of Mr Pottinger as set out in his affidavit. I must place on record that Mr Tshidada and Mr Pottinger briefly addressed me on the issue of the loss of income and I made a ruling. I was then presented with the draft order. I expressed strong views about the (lack of) value of an apportioned undertaking with which Mr Pottinger disagreed. I perused the records of Baragwanath hospital and I expressed my views about the discrepancy between the Baragwanath hospital records and the averment in the particulars of claim. It was explained to me by both Mr Tshidada and Mr Pottinger that there had been a previous injury sustained by plaintiff and there may have been an overlap of records. I certainly expressed my concerns about the costs incurred. I did, at some point, leave my chambers to advise the Deputy Judge President that I did not

consider that this matter was simply a matter of making an agreement an order of court.

40. I do believe that it is important that I confirm that, once I had examined the documentation and expressed my preliminary views to Messsrs Pottinger and Tshidada, I did not adjourn the matter and offer either of the Plaintiff's or the Defendant's attorneys the opportunity to make representations or give evidence on their conduct before I wrote my judgment.

41. I am not in agreement with Mr van der Walt that anything has been indicated to suggest that my judgment is based upon an incorrect reading of the documentation.

42. There is nothing before me which indicates any justification for payment of fees to plaintiff's attorneys. There is nothing before me which indicates that the disbursements in respect of radiologists, orthopaedic surgeons, occupational therapists or industrial psychologists should have been incurred on behalf of the Plaintiff. The Plaintiff's attorneys should not recover the fees paid to their 'counsel' Mr Pottinger.

43. Notwithstanding that one letter only from the Defendant's attorneys may have terminated the litigation, I am of the view that the Defendant's attorneys are entitled to their fees in defending this claim and accordingly their fees in respect of the appearance to defend, the plea, the pre-trial procedures and briefing counsel on trial but not in respect of instructing experts or perusing their reports (save in respect of the radiologist Dr Bloch.) Only the fees in respect the radiologist, Dr Bloch, should have been incurred by defendant. Once incurred, his report would have made it clear that no further medical reports were required and would have disposed of the matter. The Defendant's attorneys are entitled to the fees paid to their counsel, Adv Tshidada.

44. Accordingly, the order which is made is as follows:

1. The Plaintiff's attorney shall recover no fees or disbursements from the Plaintiff and the RAF shall not be liable for payment of any fees or disbursements incurred by the Plaintiff or his attorney in this litigation.

2. The Defendant' s attorneys are entitled to be paid their ordinary fees and disbursements by their client, the RAF, including counsels fees on trial and in respect of radiologist Dr Bloch but shall not be entitled to recover from their client, the RAF, the disbursements paid in respect of orthopaedic surgeon Mr JJ Van Niekerk, occupational therapist Megan Spavins or industrial psychologist Lance Marais which costs are to be borne de bonis propriis by the Defendant's attorney.

DATED AT JOHANNESBURG 30TH APRIL 2013

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K. SATCHWELL

Counsel for the Plaintiff: Wim Kraynauw Attorneys
Attorneys for the Plaintiff: Adv. K. Holland
Counsel for the Respondent: Sishi Incorporated
Attorneys for Defendant: Adv. T C Tshidada
Date of hearing: 15th March 2013
Date of Judgment: 2nd May 2013