

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 4363/2021

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED.

In the matter between:

M[....] R[....] I[....] OBO A[....] N[....]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

KGANYAGO J

[1] The plaintiff's attorneys Jacob Modiba Attorneys Inc has instituted an action for loss of support claim against the defendant arising out of a motor vehicle collision which occurred on 30th March 2018. As a result of the said collision, the plaintiff's husband sustained injuries which resulted in his death. The plaintiff is claiming loss of support in her personal and representative capacity of her minor child. The combined summons was duly served on the defendant. However, the defendant did

not defend the plaintiff's action. That led to the plaintiff setting the matter down for hearing on 23rd May 2022.

[2] In computing the damages suffered by the plaintiff, the plaintiff's attorneys engaged the services of Koch Consulting Actuaries cc (Koch). Koch prepared a certificate of value which the plaintiff's attorneys filed with the registrar of this court. In preparing for trial, the plaintiff's attorneys duly indexed and paginated the court file. One of the bundles was titled index to expert affidavit. In that index there was also the confirmatory affidavit allegedly signed by Robert Koch and commissioned in Polokwane by Kgolofelo Kenneth Ramachela a practising attorney.

[3] On perusal of the court file before the trial date, presiding Judge found it strange that Koch who according to the confirmatory affidavit is practising in Cape Town could commission his confirmatory affidavit in Polokwane. On 23rd May 2022 the court sought clarity from the plaintiff's counsel as whether indeed Koch has signed and commissioned his confirmatory affidavit in Polokwane. Counsel for the plaintiff could not answer to that, but suggested that the attorney who had briefed him should rather come to court and clarify that. The matter came back to court on 17th June 2022 wherein the plaintiff's attorney Jacob Makganyane Modiba took the witness stand and testified under oath.

[4] He testified that he is the director and founder of Jacob Modiba Attorneys. He was admitted as an attorney on 7th September 2017. That Koch was never in Polokwane to sign and commission the alleged confirmatory affidavit. That the said confirmatory affidavit was also not signed by Koch. That what had happened was that he is the one who had prepared the confirmatory affidavit of Koch, and gave it to his paralegal one Precious Nkoana to courier it to Koch in Cape Town. That Precious was having 20 years' experience in handling of RAF matters. Later Precious told him that the confirmatory affidavit has been signed and commissioned and their messenger had also endorsed it. From there Precious attended to the indexing and pagination of the court file.

[5] On Friday the 20th May 2022 he became aware that there was something wrong with the confirmatory affidavit. He immediately sent his messenger to the

registrar of this court to remove the affidavit, but the registrar told his messenger that the roll was closed, and that the file was already with the Judge. On Monday the 23rd May 2022 he wanted to remove the matter from the roll in order to rectify that, but there was nothing his counsel could do as the presiding Judge had already picked up the discrepancy of the confirmatory affidavit. He then checked with the courier company that they normally use and found that there was no record that the said confirmatory affidavit was ever couriered to Koch. When he confronted Precious, she started crying, apologised and said it was a mistake.

[6] The defendant had already given the plaintiff's attorneys an offer of R177 061.00 in an effort to settle the plaintiff's claim. The defendant's offer is in full and final settlement of the plaintiff's claim. The plaintiff had accepted this offer by filing a notice of acceptance of the offer.

[7] Legal practitioners are officers of the court, and are expected to act with integrity, honesty and with diligence at all times. Legal practitioners play an important role in the administration of justice, and a high level of professional standard is expected from them. As officers of the court, legal practitioners are expected to assist the court and not mislead it. It is the duty of a legal practitioner entrusted with a matter, to ensure that the court file is in order and that correct and genuine documents are filed at all times. Even if the practitioner can delegate his/her staff member to index and paginate the court file, it still remains his/her legal duty to ensure that the file is in order and ready to be presented in court. Legal documents filed in the court files are signed by admitted legal practitioners and not administrative staff.

[8] According to the evidence of Mr Modiba, Precious was employed as a paralegal, and part of her duties was to index and paginate court files. The actual confirmatory affidavit was prepared by Mr Modiba, who thereafter handed it to Precious to courier it to Cape Town for Koch to sign and commission. When Mr Modiba later enquired from Precious about the confirmatory affidavit he was told that it has been signed and commissioned. The index to expert affidavits has been signed by the plaintiff's attorney. Since Precious is not an admitted legal practitioner, she would not have signed it. That index to expert affidavits contained the affidavits

of the assessor, Koch and plaintiff. Before the attorney who had appended his signature on that document, it is expected of him/her to have ensured that all the documents mentioned in that index are attached to the bundle and are also genuine documents. On checking whether the documents were in order, he/she would have realised that there was something amiss with the confirmatory affidavit of Koch since it was signed and commissioned in Polokwane, whilst his instruction to Precious was to courier it to Cape Town.

[9] What is also concerning is what has been stated on the alleged confirmatory affidavit of Koch by the attorney who had commissioned it. On the certificate, the commissioner of oath has stated that the affidavit was signed and sworn in his presence after the deponent had acknowledged that he knows and understand the contents of the affidavit. If Koch was never in Polokwane, the question is whether the attorney who had administered the alleged oath on Koch was aware that the person who presented himself/herself as Koch was in fact not Koch.

[10] With the evidence presented by Mr Modiba, it is clear the alleged confirmatory affidavit of Koch has been obtained fraudulently. Fraud in itself had the elements of dishonesty. Whether Mr Modiba was involved in these fraudulent activities or was aware of it, sufficient evidence has not been placed before court to make a determination on that. It will therefore be appropriate for the Legal Practice Council to investigate the involvement of both Mr Modiba and Kgolofelo Kenneth Ramachela on whether they were involved in obtaining the fraudulent confirmatory affidavit of Koch.

[11] There is nothing on record to suspect that the deceased did not die as a result of the injuries that he had sustained whilst he was a passenger in one of the vehicles that was involved in the motor collision on 30th March 2018 along Ga-Dipere road. The defendant had given the plaintiff an offer, which the plaintiff had accepted. The fraudulent confirmatory affidavit had no bearing on the validity of the plaintiff's claim, but relate to the conduct of the legal practitioners who have obtained it. That will therefore not hamper the finalisation of this matter.

[12] In the result I make the following order

12.1 The defendant is 100% liable to pay the plaintiff's proven or agreed damages.

12.2 The defendant to pay the capital amount of R177 061.00 (one hundred and seventy-seven thousand and sixty-one rand) in full and final settlement in respect of loss of support. Payment shall be made by direct transfer into the following bank account:

Account holder : Jacob Modiba Attorneys

Name of Bank : First National Bank

Branch Code : 25036

Account number : [...]

Type of account : Trust Cheque Account

12.3 The defendant is ordered to pay costs of the suit on Magistrate Court Scale on party and party scale.

12.4 No interest will be payable on the capital sum, provided payment is made on or before 23rd November 2022. Should payment not be made timeously, the defendant will pay interest at the rate of 7% per annum from due date to date of final payment.

12.5 The notice of taxation shall be served on the defendant and the defendant is to make payment of the taxed or agreed costs within 14 (fourteen) days of taxation or agreement.

12.6 Copy of this judgment to be sent to the Legal Practice Council.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	: Adv N Phatudi
Instructed by	: Jacob Modiba Attorneys
For the defendant	: In default
Date heard	: 17th June 2022
Electronically circulated on	: 27th June 2022