THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 766/13

In the matter between:

MUSEJIE VENNON MOTSWAI APPELLANT

And

ROAD ACCIDENT FUND RESPONDENT

Neutral citation: Motswai v RAF (766/13) [2014] ZASCA 104 (29 August 2014)

Coram: Cachalia, Majiedt and Swain JJA and Dambuza and Gorven AJJA

Heard: 18 August 2014

Delivered: 29 August 2014

Summary: Finding of fraud made against attorney without a proper hearing in open court and without the facts – Judgment delivered after informal discussion between judge and legal representatives in chambers – Irregular and unfair – Second judgment failing to correct prejudicial findings against attorneys – Adverse costs order set aside.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Satchwell J sitting as court of first instance):

The appeal succeeds and the following order is made:

'(i) Para 1 of the order of the high court made on 30 April 2013 is set aside;

(ii) The defendant shall furnish the plaintiff with an undertaking as envisaged in s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 80 per cent of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment, or rendering of services or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision on 24 August 2008, after such costs are proved to have been incurred;

(iii) The defendant shall pay the plaintiff's taxed costs on the appropriate magistrates' court scale, including the costs incurred for obtaining medico-legal reports from Dr Read and Mr Moodie;

(iv) It is recorded that the plaintiff, Mr Musejie Vennon Motswai, is not personally liable for any costs, and that his attorneys, Wim Krynauw Inc, shall not claim the costs incurred for the hearing giving rise to the second judgment, the application for leave to appeal or the appeal.'

JUDGMENT

Cachalia JA (Majiedt, Swain JJA and Dambuza and Gorven AJJA concurring)

[1] When Mr C Pottinger, an attorney, and Mr T Tshidada, an advocate, both junior members of the profession, entered Justice Satchwell's chambers at the Gauteng Local Division to record a settlement agreement on behalf of their clients on 13 November 2012, they must have thought that this would be a routine exercise. For as far as they were concerned this involved a simple personal injury claim against the Road Accident Fund (the Fund), the type of case that is frequently settled in the courts without the need for a trial.

[2] They could not have anticipated that two years later, the senior attorney, Mr Wim Krynauw, whose company Wim Krynauw Inc had been instructed to handle the claim on the plaintiff's behalf, would be in this court fighting to defend his professional reputation and personal integrity against a finding of fraud that the judge would make against him in his absence and without having heard his version of the events. But this is what happened and in the main what this appeal is about.

[3] This appeal has two unusual features. The first is that although it is against an order of the high court prohibiting the plaintiff's attorneys from recovering any fee or disbursement from the plaintiff or the Fund, neither the plaintiff himself, who is cited as the appellant, nor the Fund, the respondent, has any interest in these proceedings. The Fund has indicated that it abides the decision of the court, no doubt to avoid incurring further costs.

[4] The aggrieved party and de facto appellant is the plaintiff's attorney against whom the punitive costs order was made. However, as I have mentioned, Mr Krynauw's real interest is to reverse the high court's finding of fraud against him: the adverse costs order is of

secondary importance. It follows that although the appeal is against the costs order (because an appeal lies against an order and not the findings) this is not his main complaint.

[5] The other uncommon feature of this appeal is that it concerns two judgments of the high court, not one. The first was delivered on 7 December 2012,[1] and the second, which contains the impugned order, on 30 April 2013. It was in the first judgment that the finding of fraud was made and it is this finding that formed the building block for the punitive costs order that the court was to make against Mr Krynauw in the second judgment. So, in effect, the high court granted Mr Krynauw leave to appeal to this court against both judgments.

[6] The circumstances giving rise to the finding of fraud were also unusual. The plaintiff, Mr Musejie Vennon Motswai, had instructed his attorneys, Wim Krynauw Inc, to institute a claim against the Fund for damages following an injury to his right ankle in a motor vehicle collision on 24 August 2008. The particulars of claim (the particulars) averred that he had suffered a fractured ankle whereas it transpired that he had a less serious soft tissue injury. Because of this apparent discrepancy in the description of the nature of his injury in the particulars the court found that Mr Krynauw, who signed the pleading, had fabricated the claim, misrepresented facts to the court and fraudulently set out to enrich himself and his firm from the funds intended to compensate road accident victims. His behaviour, said the judge, was 'legally untenable, iniquitous and ethically unconscionable'.[2]

[7] These findings have potentially serious consequences for Mr Krynauw and his company. They have been reported prominently in the commercial press, the law reports[3] and in at least one magazine widely distributed in the profession. That Mr Krynauw's personal reputation and that of his company have been tarnished by these findings is an understatement. He faces disciplinary action from the Law Society and his right to continue practising is now under threat. For him and his company the stakes could not be higher.

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[1] *Motswai v Road Accident Fund* 2013 (3) SA 8 (GSJ).
[2] *Motswa*i above paras 34-36.
[3] Ibid fn 1 above.

[8] In order to understand the attack against these findings it is necessary to set out the facts more comprehensively. These appear from the affidavits of the plaintiff's and the Fund's attorneys filed in response to an invitation from the judge in the first judgment for the parties' legal representatives to make submissions on their entitlement to recover fees and disbursements. The affidavits were filed before the hearing preceding the second judgment. The truthfulness of their contents was not in issue then and is not in issue in this appeal.

[9] The parties came to court on 13 November 2012 after pleadings had closed and pre-trial preparations had been completed. Ms Holland, a junior professional assistant in Mr Krynauw's company, represented the plaintiff and Mr Tshidada, the Fund. Ms Holland had prepared a undertaking, as envisaged in s 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the Act),[4] that the Fund would pay 80 per cent of the plaintiff's damages and also the cost of his future medical treatment. She included the undertaking in a draft order, which included a clause that the Fund would be liable for the payment of costs on the high court scale.

[10] The Fund refused to settle the matter on the terms in the draft order for two reasons. First, it held the view that it had already made a payment to the plaintiff for his injury. Secondly, it was only prepared to accept liability for the costs incurred on the magistrates' court scale, and not on the high court scale.

[11] As a result of this difference in opinion Ms Holland instructed Mr Pottinger, an attorney not associated with Mr Krynauw's company, to assist her in settling the matter.[5] He quickly realised that the payment to which the Fund was referring was for an earlier injury in

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[4] '**Liability of Fund and agents** . . .
(4) Where a claim for compensation under subsection (1)-
(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate-
(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or
(ii) the provider of such service or treatment directly, notwithstanding section 19 *(c)* or *(d)*,
in accordance with the tariff contemplated in subsection (4B) . . . .'

[5] Mr Pottinger is incorrectly referred to as Advocate Pottinger in Justice Satchwell's first judgment.

2006, and not to the injury that was the subject of the present claim. He drew the Fund's apparent misunderstanding to its attention and thus persuaded Mr Tshidada to tender the undertaking on behalf of the Fund.

[12] Mr Pottinger was also of the view that should the plaintiff need time off work for physiotherapy, he may also have a claim for future loss of earnings. The parties decided to approach a judge in chambers to obtain a prima facie view on this issue, which they agreed would bind them. They had also agreed that costs would be recoverable from the Fund on the magistrates' court scale and not on the high court scale, and assumed that they would so amend the order to reflect their agreement once they were given the judge's view on future loss of earnings. They proceeded to Justice Satchwell's chambers to obtain her view on the plaintiff's possible claim for future loss of earnings and to make their agreement an order of court. But the matter took an unanticipated turn.

[13] Mr Pottinger and Mr Tshidada commenced by asking the judge to make a determination on the outstanding issue of the future loss of income. She considered it unnecessary for the plaintiff to be absent from work for the physiotherapy, and communicated her view to them. They accepted her determination at which point Mr Pottinger completed a blank space that was left in the draft order that was to be filled in once the final settlement had been reached. He handed one copy of the order to Mr Tshidada and another to the judge.

[14] It recorded that the Fund would be liable for 80 per cent of the plaintiff's agreed or proved damages; that it would furnish the plaintiff with an undertaking for 80 per cent of the costs for future medical treatment; and also that it would be liable for the costs of litigation, including the costs incurred for medico-legal reports. Importantly, the parties omitted amending the order to reflect their earlier agreement for the Fund to be liable for costs incurred on the magistrates' court scale. The order given to the judge therefore mistakenly provided for costs to be on the high court scale, an issue over which the judge would later in

her judgment, without apprising herself of the true facts, direct her withering criticism at the parties' legal representatives.[6]

[15] After perusing the draft order it struck the judge as odd that no provision was made for any capital payment to the plaintiff: it provided only for a settlement on the basis of the s 17(4)(a) undertaking and costs. She began remonstrating with them and forcefully communicated her belief that the litigation had been initiated for the sole purpose of benefitting the attorneys and expert witnesses and was an abuse of the system of road accident compensation. The lawyers, as the judge was to acknowledge later in her judgment, were surprised and bewildered by this turn of events.[7]

[16] The judge informed the two lawyers that she was taking the court file and the settlement agreement to the Deputy Judge President to discuss the matter with him, and then departed leaving them outside her chambers. The file contained the pleadings (summons, particulars and plea), a 'merits bundle' comprising various documents that the plaintiff's attorneys submitted to the Fund on his behalf (RAF Form 1, MMF Form 1, Power of Attorney, Medical Consent Form, the plaintiff's identity document, Accident Report, Hospital Record and Affidavit) and the medico-legal reports.

[17] Justice Satchwell returned a short while later. She invited the legal representatives back into her chambers. On this occasion Ms Holland joined her colleagues in the judge's chambers. The judge began by drawing their attention to the fact that the hospital records reflected a soft tissue injury and not a fracture as had been pleaded. This, she said accusingly, was indicative of dishonest litigation for financial gain on the part of the plaintiff's attorneys.

[18] Mr Pottinger responded to this accusation by explaining that the plaintiff had been involved in two accidents, the first being two years before the one in question and that it was possible that this had been overlooked when the particulars were drawn. He also drew the

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[6] *Motswai* above para 89.
[7] *Motswai* above para 4.

judge's attention to the fact that the '#' symbol, which appeared on one of the hospital records, was often used as an abbreviation for a fracture, which could have caused the person who compiled the pleadings to have mistakenly believed that she was dealing with a fracture instead of a soft tissue injury. Mr Pottinger explained further that, as far as he was aware, a contingency fee agreement was in place which entitled the attorney of record to charge only 25 per cent of the capital value, or double the attorney's usual fee, whichever was the lesser. The effect of this arrangement, he argued, was that the attorneys had in fact not made any financial gain.

[19] Justice Satchwell was unconvinced by these submissions and indicated that the Fund would continue to be liable for the plaintiff's fees and disbursements despite his not having received any capital award. Further, she questioned how it had been possible for the plaintiff to have claimed R10 000 in past medical expenses and R200 000 for general damages for a non-serious injury. Mr Pottinger responded that he was not responsible for drafting the particulars or choosing the figures: he surmised that it was because it is common practice for attorneys to choose nominal amounts when drafting a summons as this made it easier to abandon a head of damage instead of attempting to add a new head before trial.

[20] Finally, the judge asked why summons was issued at all in the light of the fact that it appeared from one of the documents in the merits bundle that the claim had been lodged with the Fund together with the hospital records. Mr Pottinger justified the summons by saying that the fact that the plaintiff appeared to have suffered an orthopaedic injury, which could possibly have had an adverse effect on his ability to earn an income, merited further investigation by the attorneys. The judge's retort was that attorneys should do their investigation before issuing summons, and not after.

[21] The judge then summarily terminated the discussion by expressing her view that the matter needed to be referred to the Law Society and that the taxpayer should not be burdened by the costs of the litigation. She stated that she would reserve her judgment and excused the parties from her chambers, apparently without asking Mr Tshidada whether he wished to make any submissions for the Fund.

[22] Justice Satchwell delivered a lengthy judgment three weeks later. She had clearly given the matter some thought. The tone of the judgment is strident – almost evangelical. It contains a trenchant critique of how claims against the Fund are dealt with, and is evidently aimed at correcting the perceived abuse of the road accident compensation system by 'predatory' administrators, attorneys, advocates and medico-legal experts all of whom she accuses of being 'enriched' to the detriment of accident victims and taxpayers. But, in making this observation, no doubt because of her considerable experience with claims against the Fund, the learned judge made sweeping findings against the professionals who rendered services in this case, including the plaintiff's attorneys. She did so without conducting a proper hearing in an open court and, as will become apparent, without a factual basis. In the process she overlooked a recent dictum by this court that judges must be astute not to pontificate or to be judgmental about persons who have not been called upon to defend themselves.[8]

[23] It appears from her judgment that the documents that were handed to her in the court file revealed the following: About a year after the plaintiff had been injured in August 2008, his attorney, Mr Krynauw, caused a third party claim form to be served on the Fund claiming R120 000 for 'soft tissue injuries' to his right ankle. The claim was supported by a medical report compiled by Dr Louw. A year later a high court summons was issued claiming R390 000 – more than three times the original claim. The summons alleged that the plaintiff had suffered severe bodily injuries, including a fractured ankle. The damages claimed included past and estimated future medical expenses of R70 000, past and estimated future diminished earning capacity of R120 000 and general damages amounting to R200 000. In addition, costs were claimed.

[24] From her analysis of the documents Justice Satchwell made the following observations. The plaintiff consulted with his attorneys for the first time on 27 August 2008, three days after the accident, and authorised them to obtain his medical records from the hospital. The records showed that he had suffered no more than a swollen right ankle. This

[8] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 19.

was therefore not a 'serious injury' as envisaged in the Act and its regulations – a fact that she believed would have been known to the attorneys by 10 July 2009, when Mr Krynauw submitted the claim form to the Fund with Dr Louw's report. The initial claim of R120 000, which was submitted to the Fund, was therefore, Justice Satchwell wrote, 'known by the claimant's attorney to be unsupported by the facts'.[9]

[25] Regarding the particulars that Mr Krynauw signed on 30 March 2010,[10] she observed that they persist in claiming for the serious injury of a 'fractured right ankle'. She thus concludes:

'This is a fabrication. This is an untruth. The hospital notes say exactly the opposite – they record that an X-ray was done and there were no fractures.'[11]

And further:

'[The attorney] knowingly prepared a court document containing untruths . . . .'[12]

[26] The judge thus drew the inference that Mr Krynauw had committed fraud from a reading of the court file containing the pleadings and documents – without any other evidence. It was also the basis of the adverse findings against others mentioned in the judgment.

[27] The judge also found that none of the damages claimed in the summons were justifiable. The undertaking for future medical expenses under s 17 of the Act, she found, was an 'irrelevance' as it had no practical consequences or benefit for the plaintiff.[13] She thus concluded that the appellant's lawyers' and medico-legal fees and the costs were not justified and that they had been unjustifiably enriched at the taxpayer's expense.[14] Further, she determined, the Fund's administrators and attorneys could not escape this 'critique', because

[9] *Motswai* above paras 22-25.
[10] The date is mistakenly given as May 2010 at para 26 of the high court judgment. The correct date is given in para 28 as 30 March 2010.
[11] *Motsawai* above para 26.
[12] Ibid para 28.
[13] *Motswai* above para 52.
[14] Ibid paras 54-77.

they had adopted a supine approach to the litigation and were therefore also complicit in this deceit.[15] They too, she said, unnecessarily commissioned expert reports. Moreover, said the judge, the Fund and its attorneys inexplicably agreed to a draft order that costs were to be paid on a high court scale when the outcome only justified costs on the magistrates' court scale.[16]

[28] This course of reasoning inexorably led the judge to conclude that neither the appellant's attorneys nor the Fund's attorneys were entitled to any fees for this claim and that the costs of the experts should be met by the attorneys de bonis propriis.[17] But having come to this conclusion the judge perplexingly postponed making such an order, apparently to afford the attorneys an opportunity to make submissions on this aspect.[18] And for this purpose they were ordered to produce copies of invoices and fee statements for counsel and experts who were engaged in this matter.

[29] The court then made an order providing for the Fund to be liable for 80 per cent of the plaintiff's agreed or proven damages and that it furnish the undertaking in terms of s 17(4)(a) of the Act for his future medical expenses an order of court. This part of the order is also puzzling because the judge had earlier found the undertaking to be an 'irrelevance' having no value for the plaintiff. Her order also postponed the determination of the attorneys' fees and disbursements to a later date and referred the judgment to the Law Society of the Northern Provinces, the Bar Council and the Health Professions Council, amongst others, to investigate possible professional misconduct on the part of the professionals against whom adverse findings had been made.

[30] It is evident that the judgment was prepared on the basis of the inferences the judge drew from the documents in the court file and the informal discussions with the parties' legal representatives in her chambers. No formal record was kept of the discussion. In effect, the parties had to prepare for the hearing on costs without any record. Further, they faced the

[15] Ibid para 78.
[16] Ibid para 89.
[17] Ibid para 90.
[18] Ibid para 91.

difficulty that they could not ask the judge to undo her findings in the first judgment because once the findings were made the issues that gave rise to them were res judicata.

[31] Nonetheless, they persisted, hoping somehow to undo the findings, and prepared affidavits placing the facts before the judge. Mr Krynauw and Mr Pottinger filed affidavits on behalf of the plaintiff, and Mr Molongoana and Mr Sishi on behalf of the Fund.

[32] Mr Krynauw's affidavit sets out in detail the facts concerning the four major findings made against him and his firm: these were that he signed the particulars of claim knowing that they were untrue; that medico-legal reports were unjustifiably procured; that there was no serious injury and consequently no justifiable claim for general damages; and finally that the litigation should never have been pursued, much less settled belatedly only on the day of the trial.

[33] Of the four findings Mr Krynauw's main complaint – understandably – is the first, that he knowingly drafted particulars of claim that were untrue. In this regard he says that he has no specific recollection of the circumstances under which he signed the document. However he confirms that a candidate attorney, Ms Whittle, drafted the particulars and he signed it once he was satisfied that it contained all the necessary allegations to support the cause of action. He did not check the hospital records before signing the document as this was a time consuming exercise. Whether or not he ought to have examined the records is not a matter that arises in this appeal.

[34] He surmises that Ms Whittle probably mistakenly pleaded a fractured ankle because some of the hospital records referred to a fractured ankle while others referred to a soft tissue injury. Furthermore Ms Whittle would also have seen the plaintiff's affidavit, which stated that he had suffered a 'broken ankle'. He thus asserts that neither he nor Ms Whittle intended to plead a more serious injury than the one that the plaintiff actually suffered and that the judge overlooked the likelihood of a bona fide error arising from the hospital records.

[35] In regard to the procurement of medico-legal reports by the plaintiff's attorneys, Mr Krynauw says that the procedure he adopts is to obtain the reports after the close of pleadings and once a trial date has been allocated. And even though they endeavour to obtain reports some months before the trial it is often practically difficult to do so because examinations and assessments have to be booked far in advance.

[36] Concerning the criticism that general damages ought not to have been claimed because there was no serious injury as envisaged in s 17 of the Act, Mr Krynauw explains that when the RAF 1 form was completed soon after the accident, there was a challenge to the constitutionality of this section in the high court. The applicants, who included the Law Society, were seeking an order that the provision limiting general damages to serious injuries be declared unconstitutional. The attorneys were advised to continue claiming for general damages until the outcome of the constitutional challenge was known. Further, at the time the particulars were signed on 30 March 2010, the matter had not been finalised. Therefore, says Mr Krynauw, the judge's criticism regarding the inclusion of general damages in the particulars was based on incorrect facts.

[37] Regarding the belated settlement of the claim, Mr Krynauw says that this was a matter largely out of his hands. The situation, he says, would have been different if he believed that the claim had no merit and had so advised his client, which was not the case here. Attorneys acting for the Fund, he says, often experience difficulty obtaining mandates to make settlement offers and this is why such offers are usually made on the morning of the trial, which also seems to have happened in this case. He explains further that the firm took the following steps to settle the action:

(i) In preparation for trial the plaintiff was consulted on 3 September 2012, four years after the accident, when he reiterated that he had a 'broken' leg and was still experiencing pain;

(ii) The plaintiff was then referred to an orthopaedic surgeon, Doctor Read, to be examined. He gave his report in November 2012. From the report it was apparent that apart from needing some time off work to undergo future medical treatment, he would not suffer any loss of earnings. It also became clear then, after the relevant constitutional challenges had

run their course, that there would be no realistic possibility of a claim for general damages succeeding;

(iii) A RAF 4 form was also obtained from Dr Read to confirm that there was no serious bodily impairment. This was a precautionary measure because it would have been irresponsible for any attorney not to have had the claim investigated fully, especially in the light of the client's repeated assertion that he had broken his ankle. The plaintiff's complaint regarding the impact of his injury – that he could not walk for more than two hours – was repeated to the Fund's orthopaedic surgeon, Dr van Niekerk;

(iv) When it became clear that there was no real dispute concerning the impact of the injury, Ms Holland, who was managing the case for the firm at the time, wrote to the Fund on 7 November 2012 suggesting the action be settled. She included a request that costs be paid on the high court scale;

(v) The Fund did not respond to the proposal, and so Mr Krynauw dispatched Ms Holland to attend to the settlement and finalisation of the matter at court;

(vi) The main reason for the difficulty in reaching a settlement was the Fund's erroneous view that the plaintiff had already been compensated for that injury to his right ankle. The Fund therefore refused to give the undertaking; and

(vii) In these circumstances a decision was taken to instruct Mr Pottinger from another firm to assist with the settlement. Mr Pottinger reached an agreement with the Fund. It included the agreement for costs to be paid on the magistrates' court scale. The details of what transpired during the settlement negotiations and in Justice Satchwell's chambers are contained in Mr Pottinger's affidavit.

[38] In their affidavits the Fund's attorneys confirm that the Fund refused to tender the undertaking despite their advice to the contrary. This was because the plaintiff had previously been given an undertaking for an accident he had had two years earlier. The plaintiff had also persisted with his claim for loss of earnings, as appears from Mr Pottinger's affidavit.

[39] On the issue of the costs, they confirm Mr Pottinger's assertion that there was a prior agreement that costs would be paid on the magistrates' court scale. Mr Molongoana, an associate of the firm which represented the Fund, says that they were not given an opportunity to address the judge on this issue 'and unfortunately the matter escalated into other issues that resulted [in] this judgment'.

[40] Mr Sishi, a director in the firm, also refutes the finding that they were supine and bent on legal and expert enrichment. He says that after being instructed to defend the matter they took the following steps, all of which were necessary to protect the Fund's interests:

(i) From 9 July 2012, they began securing medico-legal appointments to assess the plaintiff's injuries. It usually took between three and four months to secure such appointments;
(ii) On 8 October 2012, after receiving a report from Dr van Niekerk, the Fund was advised to furnish an undertaking, but not to make any tender in respect of loss of income or general damages;
(iii) A further opinion was received on 25 October 2012 in which the Fund was advised that the plaintiff would require time off from work for medical treatment;
(iv) On 7 November 2012, a final quantum report was sent to the Fund; and
(v) On 13 November 2012, the Fund said that no further undertaking would be given. Mr Tshidada was then instructed to attend at court on the day of the trial.

[41] Because of the serious findings that had been made against the plaintiff's attorneys, they secured the services of senior counsel, Mr van der Walt, for the second hearing on costs. Mr Makopo appeared for the Fund. The record of the argument on costs is part of the proceedings before this court. It reveals that Mr van der Walt launched a spirited attack against Justice Satchwell's judgment. In a nutshell he submitted that she made findings against several lawyers and medico-legal experts, including findings of fraud and dishonesty against Mr Krynauw, without hearing them or conducting a proper hearing. And, he contended, the affidavits filed after the first judgment demonstrate that her factual conclusions were palpably wrong. He repeated these submissions in this court.

[42] Mr Makopo's submissions were also aimed at persuading the court that the judge's findings against the Fund's attorneys in the first judgment were wrong and that there were no grounds to disallow their fees or the disbursements that were incurred in securing the services of various medico-legal experts.

[43] The tone of the second judgment, which the judge considered not reportable, unlike the first, is considerably less strident, but is more noticeable for what it omits than for what it says. It records Mr van der Walt's submissions but then elides any proper consideration of his principal submission: that the findings against Mr Krynauw were simply wrong, particularly in regard to the finding of fraud. And it rejects the criticism that incorrect factual conclusions were drawn 'based upon an incorrect reading of the documentation', but without dealing with the content of the affidavits. Justice Satchwell concludes that 'nothing before me' justifies the payment of fees to the attorneys or entitles them to recover either the fees of Mr Pottinger, or the disbursements for the radiologists, orthopaedic surgeons, occupational therapists or industrial psychologists. However, no proper reason is given for this conclusion.

[44] The judge does not refer to her earlier findings against the Fund's attorneys. She concludes, however, that they are entitled to all their fees and costs but not the disbursements incurred for the orthopaedic surgeon, occupational therapist and industrial psychologist. Her finding that the Fund's attorneys are entitled to their fees and some disbursements, implicitly repudiates her earlier findings against them[19] – in my view, correctly so.

[45] I adverted earlier to the informal discussion in the judge's chambers before the first judgment was delivered. This was irregular. Once it became apparent from her perusal of the papers that there were concerns regarding the propriety and management of this claim, the judge ought to have terminated the discussion immediately, postponed the matter for a proper hearing in open court and directed the parties to file affidavits to address her problems. Instead, she proceeded to 'remonstrate' with them. Mr Pottinger, who was instructed on the morning of the trial to attend to making the draft agreement an order of court, was not prepared, and hardly in a position to answer some of the judge's questions regarding the history of the litigation. And it seems that Mr Tshidada, who was in a similar position, was

[19] *Motswai* above paras 78-89.

not even asked to address the judge on any of her concerns. In fact they were left 'bewildered'. So, apart from being irregular, the proceedings in the judge's chambers were also unfair. The wide-ranging findings in the first judgment against individuals who were not called upon to defend themselves cannot stand for this reason alone.[20]

[46] But apart from the irregularity and unfairness of the proceedings before the first judgment, the judge's reasoning is wrong. She drew inferences from the documents that were before her without calling for any further evidence. In this regard our courts have stated emphatically that charges of fraud or other conduct that carries serious consequences must be proved by the 'clearest' evidence or 'clear and satisfactory' evidence or 'clear and convincing' evidence, or some similar phrase.[21] In my view the documents before the judge raised questions regarding the efficacy of the claim and the costs incurred in the litigation to date – no more. The judge was entitled – indeed obliged – to investigate these questions and if necessary to call for evidence. But she was not entitled to draw conclusions that appeared obvious to her only from the available documents. As was said in the well-known dictum of Megarry J in John v Rees:[22]

'. . . [E]verybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

[47] The evidence that the parties subsequently adduced on affidavit demonstrates conclusively that the inferences drawn by the judge and the conclusions she reached were wrong. Firstly, the finding that Mr Krynauw signed the particulars that alleged a fractured ankle when he knew this was not true was conclusively refuted by his assertion that he signed the particulars without examining the hospital records; his concern was primarily to ensure that a cause of action was properly made out.

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[20] Cf *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 19.
[21] R H Christie *The Law of Contract in South Africa* 5 ed at 295; *Gates v Gates* 1939 AD 150 at 155; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 27.
[22] *John v Rees & others*; *Martin & another v Davis & others*; *Rees & another v John* [1969] 2 All ER 274 at 309.

[48] Secondly, even though the court was correct in its view that the hospital records showed that the injury was not serious, the evidence that the person who drew the particulars, Ms Whittle, probably did not read all the hospital records carefully cannot be rejected as false. It is apparent from at least two of the hospital records which the court did not refer to that there were indications of a fracture to the right ankle. The hospital record refers to '# Rt foot' which is indicative of a right foot fracture. Furthermore, the plaintiff himself complained of a broken ankle soon after the accident and again a few months before the trial. So the judge's conclusion that the drafter of the particulars knowingly made false allegations in the document is also not sustainable.

[49] Mr Krynauw's affidavit also explains how it came about that general damages were claimed in the particulars despite there not having been a 'serious injury' as envisaged in s 17 of the Act. He says that this was done because a dispute on the constitutionality of that provision was pending and attorneys were advised to continue claiming for general damages until the dispute was finalised – a fact that the judge was also not aware of when she criticised the inclusion of general damages as part of the claim. The judge fails to deal with Mr Krynauw's explanation on this aspect in her second judgment. In my view it was prudent for the attorneys to continue to claim for general damages while the legal position remained uncertain.

[50] Regarding the criticism that the judge levelled against the attorneys for including claims for past hospital expenses, medical expenses and loss of earnings, it was submitted that nominal amounts were claimed for these heads as this is the usual practice when the actual quantum has not been established at the time the summons was issued. I do not think that there is anything inherently objectionable with this practice, especially because the full extent of the injuries and their consequences had not been conclusively established before summons was issued.

[51] The next aspect that merits attention is the judge's finding that there was no warrant for engaging the services of medico-legal experts and that this was done solely to enrich the parties involved. Mr Krynauw explains why the plaintiff was referred for further assessment:

the plaintiff complained that his leg was broken and he was still in pain on 3 September 2012. He was then referred to Dr Read, an orthopaedic surgeon, and to Mr Moodie, an industrial psychologist, to be assessed.

[52] Mr Krynauw explains that it would have been unreasonable, and even negligent, for Ms Holland not to have referred the plaintiff for further assessment. She was in no position to assess the injury herself or to make the assessment regarding his future employability. Once Dr Read's report came to hand and the attorney had realised that this was not a serious injury she immediately took steps to contact her opponents to settle the matter. I find nothing in the attorneys' conduct that justifies the criticism levelled against them or the medico-legal experts. This is not a situation, as the judge found without considering the facts, where it was clear from the time of the accident that the plaintiff had no claim.

[53] Regarding the reasons why Mr Pottinger was instructed to attend to the matter on the day of the trial, the affidavits show that this happened only after the Fund's attorneys had informed Ms Holland that an undertaking could not be given because the plaintiff had been paid R20 000 sometime earlier. Mr Pottinger was asked to deal with this aspect and the issue of any possible loss of earnings on the day of the trial. He dealt with the problem efficiently and commendably by ascertaining that the amount had been paid in respect of an earlier injury and he was thus able to persuade his counterpart for the Fund to furnish the requested undertaking. And the dispute over future loss of earnings was placed before the judge for her view instead of continuing with further litigation.

[54] Mr Pottinger also accepted the Fund's view that costs should be paid only on the magistrates' court scale. The judge's finding that there was no basis to justify fees on the high court scale assumed erroneously that this is what the parties had agreed, because that is how it appeared in the draft order. Had she held a proper hearing and given the parties the opportunity to deal with all the issues – including this one – the error would not have been made. The judge made no reference to this error in her second judgment.

[55] An issue that seemed to have troubled the judge considerably was the agreement between the parties that the Fund would be liable for 80 per cent of the plaintiff's agreed or proven damages and that it would furnish an undertaking in terms of s 17 of the Act to reimburse 80 per cent of his future medical expenses. She found it 'astounding' that the Fund could agree to be liable for damages when there were none. In addition, no compensation or medical expenses would be paid to the plaintiff. Simply put, the court found there was no value in the undertaking and that its only purpose was to enrich the lawyers involved in the litigation.

[56] The court's reasoning implies that the plaintiff's attorneys should have advised the plaintiff to abandon the undertaking once it became clear that there were no general damages and minimal loss of earnings and that the undertaking would have no practical effect. But with respect, the judge could only have come to this conclusion because she misunderstood the import of the undertaking. The effect of the undertaking is that the plaintiff is entitled to 80 per cent of whatever he may pay for treatment he may receive, even if he chooses private health care. So, to put it at its lowest, it is potentially of some value to the plaintiff (and it is part of the order of the main judgment). The issue received considerable attention in the first judgment but is not mentioned in the second judgment, even though the issue was fully ventilated during the hearing. In my view the criticism directed at the attorneys for securing the undertaking, and at the Fund for acceding to their request, was misconceived.

[57] For all these reasons I conclude that a grave injustice was done to Mr Krynauw by the finding of fraud against him. The judge's criticism of Mr Krynauw's colleagues, including Mr Pottinger who dealt with this claim, was also unwarranted. There is thus no proper basis to deprive the plaintiff's attorneys of their costs.

[58] The critical remarks directed at the Fund's attorneys and counsel in the first judgment – though partially ameliorated in the second – were also not warranted, nor was the censure of the orthopaedic surgeons, occupational therapists and industrial psychologists who were engaged by the parties. The purpose of this judgment is to correct this injustice to Mr

Krynauw and to provide succour to the other persons who were prejudiced by the findings of the high court.

[59] Through the authority vested in the courts by s 165(1) of the Constitution, judges wield tremendous power. Their findings often have serious repercussions for the persons affected by them. They may vindicate those who have been wronged but they may condemn others. Their judgments may destroy the livelihoods and reputations of those against whom they are directed. It is therefore a power that must be exercised judicially and within the parameters prescribed by law. In this case it required the judge to hold a public hearing so that the interested parties were given an opportunity to deal with the issues fully, including allowing them to make all the relevant facts available to the court before the impugned findings were made against them. The judge failed to do so and in the process, did serious harm to several parties.

[60] In the result the appeal succeeds and the following order is made:

(i) Para 1 of the order of the high court made on 30 April 2013 is set aside;

(ii) The defendant shall furnish the plaintiff with an undertaking as envisaged in s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 80 per cent of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment, or rendering of services or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision on 24 August 2008, after such costs are proved to have been incurred;

(iii) The defendant shall pay the plaintiff's taxed costs on the appropriate magistrates' court scale, including the costs incurred for obtaining medico-legal reports from Dr Read and Mr Moodie;

(iv) It is recorded that the plaintiff, Mr Musejie Vennon Motswai, is not personally liable for any costs, and that his attorneys, Wim Krynauw Inc, shall not claim the costs incurred for the hearing giving rise to the second judgment, the application for leave to appeal or the appeal.

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JUDGE OF APPEAL

APPEARANCES

For Appellant:	N van der Walt SC (with him M Coetzer) Instructed by: Wim Krynauw Incorporated, Johannesburg Martins Attorneys, Bloemfontein
For Respondent:	No attendance

Instructed by:

Sishi Incorporated, Johannesburg