REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 21261/08

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

28/03/2013
DATE

SIGNATURE

In the matter between:

PRINS, YVETTE MERCELLE Plaintiff

and

ROAD ACCIDENT FUND Defendant

and

SHANE ROUX Respondent

J U D G M E N T

MOJAPELO, DJP:

[1] The questions to be considered and decided in this judgment are (a) whether the rule *nisi* issued against the respondent, a senior claim handler of

the defendant Road Accident Fund ('the Fund') should be confirmed or discharged, and (b) an appropriate order of costs.

[2] The rule was issued by this court on Friday 08 February 2013 in terms whereof Mr Shane Roux (the respondent), employed as a senior claim handler of the Fund at 38 Ida Street, Menlo Park, Pretoria, was called upon to show cause why an order committing him to prison for a period of 20 days for contempt of court should not be made final. The respondent appeared before this court on 14 February 2013 for that purpose.

[3] The material background to the issues is set out briefly. The present matter came on the civil trial roll of this court on 07 February 2013. The parties agreed at the pre-trial conference to separate merits and quantum. The determination of quantum therefore stands to be postponed. The only issue between the plaintiff and the defendant was thus merits, that is, the liability of the Fund for damages suffered by the plaintiff in a motor vehicle collision that occurred on 09 July 2007.

[4] On the latter day a collision occurred between two vehicles ('the insured vehicles'). Four claims were lodged against the Fund arising from the collision, one by each of the insured drivers, W Solomzi and P D Prins, and two in respect of passengers in the insured vehicle that was driven by P D Prins. The four claims are called linked claims. Summonses were apparently issued against the Fund in respect of each of the linked claims. The present is the last of the four claims in which merits are to be determined. It is a claim by

a passenger. It is common course that a passenger needs only prove the proverbial 1% negligence on the part of an insured driver in order to get 100% of damages that he /she is entitled to recover from the Fund.

[5] The first of these linked claims came on trial on 02 June 2011. It was, like the present, a passenger claim. Prior to that trial date the attorneys for the Fund analysed the facts and recommended to the Fund in writing that the Fund should concede merits. They advised the Fund that the proverbial 1% negligence was present. The court (per Boruchowitz J) confirmed liability and ordered the Fund to pay the full damages in an amount of R108 961.00 under case number 2008/28810. The court order was made on 02 June 2011. The proverbial 1% negligence had been established against the insured driver.

[6] On 17 September 2012 the Fund made an offer to settle merits in the second claim of the first insured driver (W Solomzi) on 50/50 basis. On 21 September 2012 the Fund made another offer to settle the merits in the third claim of the second insured driver (P D Prins) also on a 50/50 basis. Implicit in these offers is that the Fund took the view that each of the insured drivers was 50% negligent relative to the cause of the collision. The offers are consistent with the view that there is more than 1% negligence (i.e. 50%) on the part of each of the insured drivers.

[7] The position taken by the Fund in all the three previous claims would have been registered on a computerised central registration system and accessible to all claim handlers within the Fund.

[8] This is the background against which the present claim came to court on 07 February 2013.

[9] When the matter was called at the first roll call at 09h30 counsel for the plaintiff, Mr Grobler, informed the court that the plaintiff was disputing liability despite the fact that on 02 June 2011 the Fund had conceded 1% negligence on the part of the insured driver in the claim of first passenger under case number 2008/28810 and was ordered to pay 100% damages. He submitted that the defendant had no reason to dispute liability in this case.

[10] Notwithstanding the foregoing, the Fund persisted in its denial of negligence and liability for damages suffered by the present plaintiff. The defendant instead, at the second roll call, offered to settle the plaintiff's claim on the basis of 80/20 in favour of the plaintiff. When this was not accepted the Fund wanted to run the full trial on merits for the plaintiff to prove negligence.

[11] The position taken by the Fund as set out was confirmed by Mr Salojee who then represented it. Mr Salojee was not in a position to explain why the innocent plaintiff's claim had to be reduced by 20%, nor why legal costs should be incurred in running a trial to determine merits when the Fund had previously determined merits and when its liability had been confirmed by court order in the earlier case. He spoke of a risk discount but was unable to explain the risk for plaintiff in these circumstances.

[12] He was accordingly specifically directed by the court to draw the attention of his client to the fact that merits had previously been determined in case number 2008/28810 and to seek clarification why this matter should not similarly be disposed of on the basis of 100% liability in favour of the plaintiff. The matter then stood down further on the roll on Thursday 07 February 2013 pending such instructions.

[13] When the matter was called again, Mr Salojee informed the court that he had informed his client and that the instructions that came through his attorneys were for him to run a full trial to determine negligence. The court sought to establish from him and his attorney whether the Fund had given such an instruction with full awareness of the court order in case no. 2008/28810. Mr Grobler for the plaintiff then informed the court that the same attorneys firm that represents the Fund in this case had represented the Fund in the previous case under case no. 2008/28810. The court then directed the Fund through its counsel to reconsider its position or to explain the different attitude, as it appeared that they were abusing the process of the court.

[14] At the third roll call at 14h00 on Thursday 07 February 2013 Mr Salojee indicated that his attorney, Ms Sembe, would explain the attitude of his client.

[15] Ms Sembe confirmed that her firm acts for the Fund in the present matter which she deals with. The firm also represented the Fund in case number 2008/28810 which Ms Bokaba dealt with. In the present matter she was instructed by Mr Shane Roux, a senior claim handler at the Fund, that

she was to dispute liability and run the trial to determine merits. Mr Roux was aware of the outcome case no. 2008/28810 regarding merits, but nevertheless wanted merits to be disputed and the trial in this case to run on merits. She submitted a written recommendation to the Fund in which she advised the Fund to concede merits in this case. She disclosed further that her office was acting on behalf of the Fund in another claim (the third claim) instituted by the insured driver arising from the same collision. In the claim of the insured driver the Fund had instructed her office and an offer had been made to the driver conceding liability on the basis of 50/50. She acted on the instruction of Mr Shane Roux when she instructed counsel to dispute liability on the part of the Fund and to run the full trial in this matter. There was no explanation as to on what basis the Fund would deny liability when it previously conceded it. Ms Sembe was then directed by the court to call the relevant claim handler, Mr Shane Roux, to come to court on Friday 08 February 2013 to explain the attitude of the Fund.

[16] On 08 February 2013 counsel for the Fund informed the court that Mr Shane Roux had been informed of the directive of the court to come to court as ordered on 07 February 2013. Mr Roux had however informed his attorneys that he was not coming to court as directed. He had however given instructions for the Fund to concede 100% liability. No further explanation was given.

[17] Ms Itumeleng Bokoba, the attorney who acted on behalf of the Fund in case number 2008/28810, confirmed that she is from the same firm as Ms

Sembe. Prior to 02 June 2011 she submitted a written report with a summary of the relevant facts to the Fund in which she recommended settlement. The Fund had been advised to accept liability to pay the full claim in an amount of approximately R109 000.00. The recommendation was made based on the view that the requisite proverbial 1% negligence on the part of the insured driver was established. This is the background against which the order of 02 June 2011 was made.

[18] The instruction of the Fund to its attorneys to proceed to trial and to fight merits in the current case in these circumstances was inexplicable. The attorneys would have to contend that there was no 1% negligence on the part of the insured driver. This did not make sense as the Fund had already conceded 50% negligence on the part of the driver. The attorneys were instructed by the Fund to argue, through counsel, contrary to and inconsistent with their own advice, contrary to and inconsistent with the position already taken by their client in the two previous matters arising from the same accident, and finally inconsistent with the finding confirmed by the court. The attitude taken amounted to an abuse of court process. The person responsible for the inexplicable and abusive instruction had to explain his conduct to the court. The running of the trial on merits in these circumstances would simply increase costs and line the pockets of two teams of legal representatives, one counsel and an attorney on each side, waste the court's time and serve no real useful purpose. It was inconceivable that a court would find that there was no negligence on the part of the insured driver. The process contemplated by the Fund, through Mr Roux, appeared inexplicable

and abusive. Mr Roux had decided not to come to explain as directed by court. On the face of it he was in contempt of court. The court thus issued the rule nisi referred to in paragraph 2 of this judgment after hearing counsel on both sides.

[19] As already stated, Mr Shane Roux, appeared on 14 February 2013, to show cause why the order issued as a rule *nisi* should not be confirmed. He was represented by Mr Saint assisted by Mr Salojee. The two also represented the Fund on that day. Mr Roux testified under oath. He holds the B Proc degree, never served articles, but worked at the Fund since 2001. He started as a claim handler and was promoted through the ranks. He holds the position of senior claims handler since 2008. Throughout his career at the Fund he was dealing with litigated matters where the Fund instructed attorneys who represented it.

[20] He confirmed that his attorney informed him after the proceedings of 07 February 2013 that he was required by court to appear before court on 08 February 2013. He decided not to appear. He says he thought that if he gave instructions to the attorneys to concede merits he did not have to appear.

[21] The communication to him was however clear: he was required to come to court on the particular day. He did not come. There is no suggestion that he did not understand. There was no room for misunderstanding. He was clearly in contempt. The order issued and which was communicated to him

at the end of the day on 07 February 2013 was not for him to reconsider his position on merits. He had had an opportunity earlier that day, when requested by his attorney on the direction of this court, to reconsider. He had decided not to do so and had instead instructed his counsel to run the merits trial.

[22] Mr Roux confirmed the existence of a central registration system for claims within the Fund from which any claim handler can view linked claims. The viewing for each file on the system would indicate whether the particular claim has been finalised or is still pending. It would also indicate if merits have been conceded, settled or determined. The present matter is the last claim in which merits were to be determined on 07 February 2013. There is no explanation why the Fund had to run a merits trial in this case when the same Fund was prepared to concede 50% negligence in favour of each of the insured drivers. He says he did not view the central registration system prior to giving instructions to contest merits in this case. The position taken by the Fund in the three previous cases would have appeared on the central claim registration system. He also did not view it when in the morning of 07 February 2013 his attention was drawn to the outcome in case no. 2008/28810.

[23] It is totally unexplained why he did not do so. The central claim registration system is precisely there for that reason. The Fund and its employees are expected to save costs and the court's time by utilising what is available to them. Mr Roux says he only retrieved and looked at the two files

of the claims lodged by the insured drivers on Monday 11 February 2013 after the rule *nisi* had been served on him. He was by then already in contempt. He does not explain why he did not do so earlier. He concedes he could have done so.

[24] The explanation of Mr Roux for not conceding merits earlier in this case is incomprehensible. His conduct was that of an irresponsible employee of the Fund whose conduct put his employer at risk to incur substantial legal costs unreasonably. He was grossly negligent and reckless in taking a position on merits without utilising the information readily available within the Fund. He has worked at the Fund for 12 years since 2001 and is thus fully aware of the system. If he had acted reasonably he would have had regard to what was available and would have conceded merits and saved the costs.

[25] He confirms that the Fund received an executive summary from its attorneys already before 02 June 2011 in which the attorneys recommended that the Fund should concede merits. He ignored this advice. He has no explanation for doing so. His conduct was nonsensical and puzzling. He appeared to have been moved by a motive which has not been explained in seeking to run merits when merits had already been determined by the attorneys, the Fund itself and the court. He acted mala fide. He did not act with proper regard to the interest of the victims of motor vehicle accident which is the key business of his employer. He adopted a hard line attitude towards merits in this case of the plaintiff, whose claim happens to be the last in the series of assessment of merits. It is a claim in which merits should have

been disposed of long before 07 February 2013. At the earliest merits in the present case should have been disposed of in June 2011 and at the latest in September 2012. There was no reason to persist in the denial of merits after the latter date.

[26] The Road Accident Fund thus acted unreasonably in incurring the trial costs of 07 February 2013 and 08 February 2013. There was no reason to contest merits in the light of the information available to it before those dates. It should be mulcted in punitive costs for those days.

[27] The costs incurred after 08 February 2013 arose entirely from the contempt committed by Mr Roux. He was then no more defending the claim against the Fund which conceded merits on 08 February 2013. Those costs were incurred in defending Mr Roux and not the Fund. He, in any event, acted recklessly and mala fide and thus must lose any indemnity or immunity against costs which he might otherwise enjoy. There is no reason why such costs should be paid out of the public funds administered by the Fund.

[28] One needs not deal at any length with the applicable legal principles and the negative impact on court rolls caused by the kind of conduct on the part of officials of the Fund that one has to do with in this case. More than enough has been said on that score by the courts over the years. See for instance *Bovungana v RAF 2009 (4) SA 123 (E) esp at par 3,7,19* (per Froneman J) and *Kunene v RAF, SGHC unreported Case No, 2007/8693*

(delivered on 08 Dec 2011) *at par 25* (per Moshidi J) and other cases referred to in these cases.

[29] I accordingly make the following order:

(1) The rule *nisi* issued by this court on 08 February 2013 is confirmed subject to the qualification in the next paragraph.

(2) The period of commitment of Mr Shane Roux to prison in terms of the rule is wholly suspended for a period of twelve (12) months on condition that he shall not be found guilty of contempt of court committed during the period of suspension.

(3) The defendant (Road Accident Fund) shall pay the costs of 07 and 08 February 2013 on attorney and client scale.

(4) The respondent, Mr Shane Roux, shall pay the costs incurred in this matter after 08 February 2013 *de bonis propriis*.

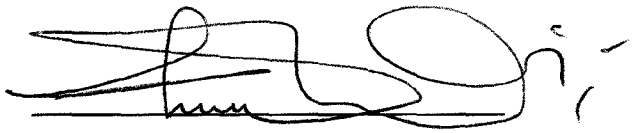
(5) Save as aforesaid, the parties having agreed thereto, I make the following order:

5.1 The issues of merits and *quantum* are separated in terms of Rule 33 (4) of the Uniform Rules of Court;

5.2 The defendant shall pay to the plaintiff 100% (one hundred per cent) of her proven or agreed damages;

5.3 The defendant is liable to pay the plaintiff's party and party costs on the High Court scale for determination of liability;

5.4 The determination of quantum is postponed *sine die.*



P M MOJAPELO
DEPUTY JUDGE PRESIDENT
SOUTH GAUTENG HIGH COURT

Counsel for Plaintiff:	C J Grobler
Instructed by:	Levin Van Zyl Inc.
Counsel for Defendant and Respondent:	F A A Saint and Y F Salojee
Instructed by:	Hlatshwayo Kekana Radebe Inc
Date of Hearing:	14 February 2013
Date of Judgment:	28 March 2013