LAWYERS' LOST SCRUPLES HIGHLIGHTED IN RAF RULING

Kim Hawkey – Editor

Following the festive season each year, South Africans are reminded of the tragedies that occur on our roads throughout the year, especially during the year-end holiday period.

With this background, I was saddened to read a recent judgment by Satchwell J that highlighted shameless abuse of the road accident compensation system at the hands of lawyers.

The case of *Motswai v Road Accident Fund* (GSJ) (unreported case no 2010/17220, 7-12-2012) (Satchwell J) is a demonstration of how, in Satchwell J's words, the system of road accident compensation has been 'utilised as a means of providing a livelihood for administrators, attorneys, advocates and professional experts'.

In this matter the accident 'victim' – who suffered a minor ankle injury when, as a pedestrian, he was involved in a motor vehicle accident – received absolutely no benefit from the litigation, which the judge found to have been 'for the sole benefit and enrichment of "facilitators" [including legal representatives] of access to road accident compensation'.

The victim's lawyers had instituted a claim against the Road Accident Fund (RAF) for almost R 400 000, including an amount for general damages, plus costs, based on the victim's alleged 'severe bodily injuries' as set out in the particulars of claim signed by his attorney. This despite the hospital records clearly indicating he suffered no more than a 'swollen' and 'tender' ankle.

The lack of merit in the quantum of the claim did not prevent the matter being settled on the trial date. According to the settlement agreement, the RAF would be liable for 80% of the plaintiff's agreed or proven damages. However, the court found that, as the plaintiff did not qualify for general damages and, as his injury did not require past – and was highly unlikely to require future – medical treatment at a cost, he was unlikely to receive any benefit as a result of the litigation. The agreement also provided for the RAF to pay the plaintiff's taxed or agreed party-party costs on the High Court scale, including for the experts' reports.

In response to the question 'What was this litigation all about?' posed by the judge, she responded: 'The answer … is, to my mind, to be found in the accepted litigation practice that "costs follow the result".'

In the judgment, which was to be forwarded to the Law Society of the Northern Provinces, the Bar Council, the chairperson of the RAF, the Minister of Transport and the Health Professions Council of South Africa, the court found: 'There never was any "serious injury" sustained by this road accident victim. Nevertheless the attorney litigated for general damages. The attorney signed particulars of claim founded upon an injury which the hospital records clearly indicated had never existed and had been excluded by hospital investigation. This was dishonest litigation.'

The court further berated the litigant's attorney, who, as an officer of the court, knowingly prepared and signed the particulars of claim 'containing untruths … material to that court document'.

'[T]his signature debases the meaning of signatures on particulars of claim and the trust which can be placed thereupon,' the court held.

The court also placed blame at the door of the RAF, which together with its attorneys 'appear to have been supine and uncritical when confronted with this claim'.

'[T]hey appear content to have proceeded upon the same road to legal and "expert" enrichment,' the court added.

The court summed up the effect of such abuse as follows:

'Those who naively believe that the system of road accident compensation exists for the benefit of road accident victims might be surprised to find that the victim's attorney and advocate and expert witnesses will be rewarded notwithstanding absence of payment to the road accident victim of any actual money as damages or compensation. One might well question where the success is to be found for [the litigant's] attorney to recover costs? After all, [he] has not and will not receive one penny or any benefit from this entire exercise. … However, his legal representatives are certainly enriched.'

In response, Satchwell J indicated that she did not believe that any of the attorneys involved in the matter should receive fees in respect of the matter and nor should the expenses incurred in respect of 'experts' 'be a burden on the public purse'. If remunerated, the attorneys should meet these disbursements *de bonis propriis*, she said. The judge added that counsel should be awarded costs on the magistrate's court scale rather than the requested High Court scale.

The judge concluded by postponing the hearing in respect of the attorneys' fees and disbursements.

Worryingly, comments by Satchwell J in the judgment indicate that the type of unconscionable conduct by professionals in this matter is not unusual. The memory of the *Pretoria Society of Advocates and Another v Geach and Others* 2011 (6) SA 441 (GNP) case, too, is fresh in the minds of the public.

The damage caused by such contemptuous conduct by officers of the court, as well as the perception it creates, is felt most by taxpayers and those who are truly deserving of such compensation.

While fortunately the vast majority of attorneys practise in accordance with high ethical standards, it is sad that the conduct of a few bad apples sullies the whole profession.

It is therefore hoped that the attorneys' profession takes a firm stance in curtailing such behaviour to protect both the public and the reputation of the profession, and that the fund corrects the apparent failings in its procedures.

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