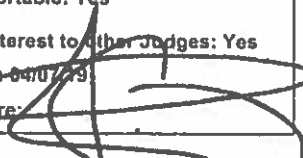




IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

CASE NO: 915/2017

|                                                                                              |
|----------------------------------------------------------------------------------------------|
| (1) Reportable: Yes                                                                          |
| (2) Of interest to other Judges: Yes                                                         |
| (3) Date: 04/07/19                                                                           |
| Signature:  |

In the matter between:

**ADVOCATE NICO HORN**

(on behalf of LEPHETHISANG ALPHIOS MOKOENA)

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**Reasons for order**

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**MAKHUVELE J**

***Introduction***

[1] The plaintiff is the *curator ad litem* duly appointed and clothed with amongst others, powers to conduct litigation and related functions to prosecute a claim against the Road Accident Fund (defendant) on behalf of

Lephithisang Alpheos Mokoena (who I shall henceforth refer to as 'Mokoena'), an adult male, to recover damages resulting from injuries that he sustained when he was knocked down by a motor vehicle on or about 07 October 2015.

[2] On 18 October 2016 the defendant made an offer of settlement on the basis that the accident was caused by the joint negligence of both the insured driver and Mokoena and that the latter's contribution thereof was 30%. This offer was duly accepted by Mokoena's attorneys and the acceptance was subsequently ratified by the plaintiff.

[3] The trial before me was only with regard to the issue of quantum, specifically on loss of earnings and general damages. At the commencement of the trial I was informed that the parties had agreed to settle the claim for future medical expenses on the basis that the defendant would provide an undertaking certificate in terms of Section 17(4) of the Road Accident Fund Act, No. 56 of 1996.

[4] This matter was allocated for a two (2) hour argument before me on what was indicated in chambers to be a dispute relating to the appropriate contingencies to be applied on the agreed calculation for loss of earnings. With regard to the general damages, there was no real dispute but merely a measly amount differential.

[5] The plaintiff's counsel proceeded to address me on the common cause issues arising from the filed expert medical reports. He also referred to the joint minutes of the Orthopaedic surgeons, Clinical psychologists, Neurosurgeons, Occupational therapists and Industrial Psychologists. There were other medical expert reports that were not contested. I was advised that

there was no need for me to interrogate the agreements between the joint medical experts because none of the parties has timeously disputed their findings and that this was in line with the SCA decision in the matter of *Glenn Mare Bee v Road Accident Fund*<sup>1</sup>.

[6] According to the medical expert reports Mokoena has suffered a traumatic brain injury with serious sequelae, a chest injury, left tibial injury with and injury to the knee, lung contusion, grade 4 renal failure, multiple facial, hands, knees, and right hip abrasions, right shoulder injury, dental injury with loss of teeth and lumbar spine fractures. He has a permanent neurological disability.

[7] The medical experts were in agreement with regard to the extent of the injuries, sequelae, prognosis and bleak prospects regarding future employability and personal care to such an extent that there was a need for appointment of a *curator bonis* for Mokoena at a later stage.

According to the plaintiff (*curator ad litem*), Mokoena cannot communicate meaningfully as he is severely dysphasic. He can only give hand gestures and nodding. The defendant did not raise any disputes with regard to the plaintiff's entitlement to the assessed damages as well as the basis for and the actuarial calculations of loss of earnings.

[8] The plaintiff's actuaries were guided by the agreements between the respective Industrial Psychologists for the basis of calculation of the loss of earnings. The defendant did not file any actuarial calculations.

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<sup>1</sup> (093/2017) zasca 52 (29 March 2018)

***The issue for determination***

[9] In a surprise move, the alleged contingency dispute was not raised in court. As counsel for the plaintiff was wrapping up his submissions with regard to the common cause issues and confirming that no disputes were raised on any one of them, I then enquired if there is any remaining dispute at all. That is when I was advised that the defendant's counsel had indicated that she intended to argue for a reduction of the agreed nett loss of income with the value of the disability grant that Mokoena is or was receiving.

[10] The two (2) hour allocation ended up being a full blown trial lasting one and a half days on an issue that was not pleaded, or raised in any of the pre-trial conferences.

[11] I agree with the sentiments expressed by counsel for the plaintiff that this was a classic trial by ambush because this issue was only communicated to him as he was addressing the court on issues that were common cause to enable me to apply my mind on the question of appropriate contingencies.

[12] At the end of the first day of trial, counsel for the defendant indicated that she had not considered the Constitutional Court judgment that the plaintiff's counsel had referred to although she had read a bit during the proceedings. She asked for an indulgence and my copy as she wanted to read it overnight. When I adjourned the proceedings, I requested her to reflect on the issue of costs and whether, under the circumstances, the representatives of the defendant should be entitled to costs beyond the two hour allocation or at most one day trial fees.

[13] I heard the parties' respective argument and considered the relevant authorities that were occasionally handed up, thanks to the technological advancements that allow for a quick access to legal reports. I rejected the defendant's contentions on this issue and proceeded to make an order that was by consensus, save for this issue and a difference of R200 000.00 in general damages. Due to time constraints, I was unable to give an *ex tempore* judgment on the disputed issue, but undertook to issue written

reasons on it as well as the cost order on 'attorney and client scale' as indicated in paragraph 10 of the order.

[14] I made an order that is attached to these reasons as 'XY'. It makes provision for amongst others, an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act and payment of an amount of R1 531 934.00 which comprises of 70% of the proven loss of earnings and general damages in the respective amounts of R551 934.00 and R980 000.00 .

[15] The purpose of these written reasons is to restate the legal position with regard to the question of deductability of Social Assistance grants from damages awarded to claimants in Road Accident claims. The second issue is about costs for the extended trial under circumstances where the issues were not raised in pleadings.

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### ***Submissions***

#### **Plaintiff**

[16] The argument was based on case law, The contest being which of the cases are relevant and binding on me.

[17] Counsel for the plaintiff referred to the following cases;

[17.1] Nxele v President Insurance CO LTD (WLD) Case No. 8652/92<sup>2</sup>  
at C4-6 per Blieden J

*"As far as the disability grant of R293 per month is concerned, this amount has nothing to do with the plaintiff's former employment. It is an amount paid to any person who proves his disability even if he at no stage had a job at all. It is nothing but a gratuitous payment made by the State to those who cannot fend for themselves because of a physical or mental disability and who have no source of income. The law in this country is that payments made as gratuities are not deductible from any awards for loss of earning capacity. This has been authoritatively settled by our courts, Santam Versekeringsmaatskappy v Byleveldt 1973 (2) SA 146 (A) at 150F, where*

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<sup>2</sup> Corbett and Buchanan (Service 4, 1995) C4-1

*Rumpff JA (as he then was) quoted with approval Lord REID's dictum in Parry v Cleaver 1970 AC 1 at p.14, which is to the following effect:*

*It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benovolence of his friends or relatives, or of the public at large, and that the only gainer would be the wrongdoer"*

[17.2] Masipa J in the matter of Mabunda Johannes v Road Accident Fund (WLD)<sup>3</sup> outlined the procedures for applying and suspension of a grant in terms of the Social Assistance Act 13 of 2004. A person qualifies for the grant if he/she satisfies the applicable means test and it may be suspended or cancelled when the applicant's financial situation improves to such an extent that he/she no longer qualifies. At paragraph [47] she stated the following;

*"Counsel for the plaintiff correctly submitted, in my view, that the enquiry as to whether or not the grant ought to be suspended is not one for this Court to decide. However, the court was urged to make an order compelling the parties to disclose the award granted to the South African Social Security Agency to protect its interest.*

[17.3] The suggested court order was however not made. The plaintiff's counsel also suggested an order along these lines, however, in my view these are administrative matters that the defendant should have dealt with and can still attend to at any time in terms of its role and mandate. A disability grant is subject to periodic reviews and such entail an obligation to make certain disclosures.

[17.4] Mavundla J in this division was faced with a similar issue in the matter of Sello Marks Moroane v Road Accident Fund<sup>4</sup>. He relied on the Constitutional Court judgment in the matter of Coughlan NO v Road

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<sup>3</sup> Case No.29668/05, judgment delivered on 26 March 2008

<sup>4</sup> Unreported, Case no. 39680/2012, judgment delivered on 27 August 2018

Accident Fund<sup>5</sup> where the issue was whether foster care grants are deductible when calculating future loss of support for the children. The High Court had held that it was not deductible because it was *res alios acta*. This decision was overturned by the Supreme Court of Appeal. The Constitutional Court disagreed with the SCA's decision that the grants amounted to double compensation because the grant is not paid as damages but in terms of the State's constitutional obligations. The grant is paid on the basis of need of care and there is no causal link with the death of a parent. It also took into account the fact that the RAF Act is silent on the matter.

[17.5] The Constitutional Court mentioned one exception specifically provided for in the RAF Act, namely, if the claimant is entitled to claim under the Compensation For Occupational Injuries and Diseases Act, Act No.130 of 1993.

[17.6] In this judgment, the Constitutional Court was also asked to decide whether the SCA decision in the matter of Road Accident Fund v NF Timis<sup>6</sup> was correct where it was stated that :

*'The State assumed responsibility for the support of the children as a result of the breadwinner's death. The moneys paid out in terms of the Road Accident Fund Act and the Social Assistance Act are funded by the public through two State organs. Not to deduct the child grant would amount to double recovery by the respondent [the mother] at the expense of the taxpayer and this is incapable of justification. In my view it was not the intention of the Legislature to compensate the dependants twice.'*

[17.7] The answer to this was as follows:

*[57] That reasoning is not sustainable. It fails to acknowledge the different roles that the state assumes when it makes the payments. In cases of child support grants, the state assumes the role of a caregiver as enjoined by the Constitution. When it pays compensation for loss of support through the RAF it steps into the shoes of the wrongdoer. It is irrelevant that the money is paid*

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<sup>5</sup> 2015 ZACC 10

<sup>6</sup> (29/09) [2010] ZASCA 30 (26 March 2010)

by two state organs because its objectives are completely different and the state, when it makes the payment, does so to fulfil a myriad of obligations. Thus the fact that child support grants, foster child grants and damages from the RAF are paid from National Treasury is of no moment.

[58] Like foster child grants, child support grants are not predicated on the death of a parent. The fact that the state assumed responsibility for the support of the children after the death of the breadwinner should not have been held to be a determining factor on whether the caregiver qualified for the child support grant or not.

[59] The purpose of the RAF is to give the greatest possible protection to claimants.<sup>[27]</sup> A deduction of either foster child or child support grants would undermine that purpose. A reading of the RAF Act suggests that those grants should not be deductible. The RAF Act expressly provides that<sup>[28]</sup> double compensation for persons who are entitled to claim under the Compensation for Occupational Injuries and Disease Act<sup>[29]</sup> should be deducted from compensation by the RAF but there is no equivalent reference to social grants.

[60] I conclude that the outcome in *Timis* was incorrect. Child support grants are for the reasons stated above on the same footing with foster child grants and should not be taken into account when an award of damages for loss of support is made.”<sup>7</sup>

### Defendant

[18] In addition to the *Timis* judgment, the defendant’s counsel referred to the Supreme Court of Appeal decision in the matter of *RAF V Lechner*<sup>8</sup>.

[19] With regard to the *Timis* judgment, her argument is similar to the passage that I have quoted above, which, after consideration, the Constitutional Court has ruled that the reasoning was not sustainable, effectively overruling this SCA decision.

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<sup>7</sup> footnotes and references were omitted.

<sup>8</sup> (711/2010) [2011] ZASCA 240 (1 December 2011).

[20] The argument and reliance on the Lechner judgment is that this matter addresses the same issue as the one before me, and as such, it is relevant and binding .

[21] Counsel also sought to distinguish the issues in the Lechner and the Constitutional Court judgments on the basis that the latter deals with foster care grants whereas the Mavundla J judgment dealt with disability grants. The Lechner judgment dealt with benefits paid from insurance.

She referred to paragraphs 12 and 14 of the Lechner judgment which reads as follows:

*[12] The approach to the deductibility of benefits has been restated on several occasions in this court and can now be considered settled. Benefits resulting from the damage causing event are generally deducted. Collateral benefits such as those deriving from private insurance contracts or the benevolence of third parties are not. There is no clear jurisprudential basis for deciding what benefits are collateral; the inquiry mainly involves considerations of public policy and equity. In this regard a court will weigh two conflicting considerations: the plaintiff should not receive double compensation and the wrongdoer or his insurer should not be able to avoid the full extent of his liability. What a court considers just and equitable will inevitably depend on the circumstances of each case.<sup>1</sup>*

*[14] Although a similar case to Hodgson has not arisen in South Africa, this court in Bane v D'Ambrosini<sup>5</sup> appears to have accepted, at least implicitly, that benefits from social insurance or national health schemes similar to those in a 'European context' would be deductible in this country. This follows from the fact that Hurt AJA distinguished such schemes from privately run medical schemes regulated by the Medical Schemes Act 131 of 1998 in this country.<sup>6</sup> In two cases, South African courts had to consider the deductibility of 'social-security benefits' received in foreign countries.*

[22] On how much according to her should be deducted in the matter before me, counsel for the defendant conceded that there was no readily available answer because the RAF has not done calculations. She however referred to the report of an Industrial Psychologist wherein it was stated that Mokoena was receiving Disability Grant in an amount of R1 700.00 per month from February 2016. She then suggested that I should calculate the amount to be deducted from this date to date of trial. On her calculations, the amount to be

deducted would be R66 300.00. She was however not certain when he was last paid and challenged the plaintiff's counsel to come up with the information.

### **Discussion**

[23] As I was preparing this judgment I came across the judgment of Muller J in the matter of Kapa v RAF<sup>9</sup> at the Polokwane High Court in which he disagreed with Mavundala J in the matter that I have referred to above. He stated the following:

*[6] In Coughlan NO v Road Accident Fund<sup>[10]</sup> the Constitutional Court did not consider what the effect is on a claim for loss of earnings if the plaintiff is the recipient of a disability grant from the state. It held, with reference to the nature and purpose of foster care grants, that those grants which arose from the constitutional obligation of the state to provide for children in need of care are different from compensation. It was held that foster care grants are not paid to the children and is furthermore not predicated on the death of a parent.<sup>[11]</sup> I interpose momentarily, to point out that, in my respectful view, the judgment is not authority to hold that disability grants should be regarded as similar to foster care grants. Different considerations apply to disability grants.*

*[7] However, to determine whether payment of a disability grant amounts to double compensation, a similar approach adopted by the Constitutional Court in Coughlan NO will be followed:<sup>[12]</sup>*

*(a) What is the constitutional obligation of the state in terms of section 27 of the Constitution;*

*(b) The nature and purpose of disability grants vis-a-vis that of compensation for loss of earnings;*

*(c) Whether there is any causal link between a disability grant and compensation for loss of earnings.*

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<sup>9</sup> Kapa v RAF (1414/2013) [2018] ZALMPPHC 67 (7 December 2018). Footnotes have been omitted.

[8] It is acknowledged in section 27(1)(c) of the Constitution that the state has an obligation to make social security available to everyone and if they are unable to support themselves and their dependents appropriate social assistance must be provided. The Constitution is not prescriptive as how the state should make grants available within the available recourses. It was left to Parliament to decide. The Social Assistance Act 13 of 2004 provides for the provision and administration of social assistance and the qualification requirements for such assistance. [13] The eligibility of a person to apply for a disability grant is set out in section 9 of the Social Assistance Act which reads as follows:

"A person is subject to section 5 eligible for a disability grant if he or she -

(a)...

(b) is owing to a physical or mental disability unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance."

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[9] The RAF Act is silent on whether a disability grant, in particular, should be included or excluded from compensation. [14] It does not follow, merely, from such silence that social grants which are available in terms of the Social Assistance Act should simply to be ignored, even if it leads to double compensation. [15]

[10] The nature and purpose of a disability grant is clearly intended to give financial assistance to anyone who as a result of physical or mental disability irrespective of the reason is unfit to obtain the means to provide for his/her maintenance. I do not understand this to mean that a person is only eligible if he/she is totally disabled. All that is required is that the disability should be of such a degree that it renders a person unable to maintain him/herself by means of employment. Put differently, a person who is meaningfully employed but his/her remuneration as a result of his/her disability is so meagre that he/she is unable to maintain himself/herself should qualify.

[11] In casu the disability grant is paid to the plaintiff as a direct result of her disability which was caused by the injuries she sustained in the motor vehicle collision. The plaintiff is regarded as unemployable and damages are claimed for loss of earnings due to injuries sustained the result of which is a total loss of income. [16] The physical injuries which she sustained rendered her totally unfit for employment and unable to maintain herself. It comes as no surprise that she qualified for a disability grant.

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[12] *The grant is not paid to the plaintiff a result of the generosity, benevolence or charity of the state, but as financial assistance by the state due to the injuries sustained which caused a loss of income, but also in terms of the constitutional obligation to render social security to everyone in need of such assistance. That, is of course, what her claim for compensation is all about.*<sup>[17]</sup> *Thus, there is very close causal link between the reason for the disability grant and the claim for loss of income.*<sup>[18]</sup> *There is no doubt in my mind that the payment of the disability grant leads to double compensation.*

[13] *In addition, it must be taken into consideration that the public carries a heavy financial burden towards the state. The ongoing financial woes of the RAF is notorious and well known. The funds utilised by the RAF and the funds allocated for social grants originates from public by means fuel levies on the one side, and taxes, on the other. Public policy, fairness and justice demands that overcompensating motor vehicle accident victims from public funds should be avoided.*<sup>[19]</sup> *Fairness and justice demands that the disability grant be deducted from the award to be made.*

[14] *Finally, I respectfully disagree, for the reasons set out above, with the judgment in Moropane<sup>10</sup> v RAF which held that a disability grant paid by the state should be ignored and not be deducted.*

[15] *The RAF is successful with regard to the separated issue and is entitled to its costs.*

[24] I do not think that the criticism or disagreement expressed by Muller J with Mavundla J's judgment is justified because he (Mavundla ) relied on the one exception in the RAF Act that the Constitutional Court pointed out as justifying a deduction from claimant's award on the basis of double compensation. The Constitutional Court was alive to the fact that the RAF was silent on whether foster grants should be deducted or not.

[25] It is common cause that foster care grants, old age pensions, disability grants and other social assistance grants in South Africa are administered in terms of the Social Assistance Act as indicated in the judgment of Masipa J in the Johannes Mabunda matter. The Constitutional Court would have addressed this issue if it felt that it required separate mentioning. In my view,

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<sup>10</sup> There has been a hand-written correction on Mavundla J's judgment of the name to read "Moroane"

the purpose of the enabling Act and the constitutional imperatives are the same.

[26] In my view, Muller J had before him sufficient evidence to make factual assessment regarding the causal link between the disability grant and the accident. However, even so, as Masipa J has pointed out, there are procedures for terminating social grants, and the courts have no jurisdiction in that regard because these are administrative issues and courts cannot sit as tribunals of first instance. As I have pointed out above, the defendant may take steps, if it so wish, to deal with the matter administratively to cancel or recoup the money that has already been dispensed, which is unknown to me because there is no such evidence.

[27] Similarly, the defendant's reliance on the Lechner judgment was not clearly articulated save for the argument that if the accident is removed, Mokoena would not have received the disability grant.

[28] The issue before court in the Lechner matter was the correct characterisation of the benefit that the claimant received from a foreign insurance company, and it was found to be one that would not constitute double compensation. The SCA decided as follows:

*[19] I accept that the premiums paid by Ms Lechner bore no direct relationship to the risk insured. In this sense the scheme to which she belonged differed from the usual private medical schemes. But it is beyond dispute that she enjoyed benefits as a voluntary member at the time of her accident. The fact that she later at times became a compulsory member after her accident, which was forced upon her because of the injuries she sustained in the accident, cannot in my view change the situation. Crucially, as I have mentioned, she received her benefits in return for her contributions. Had she ceased paying contributions, her benefits would also have ceased, or later been suspended. In my view this is sufficient to render the benefits received from the KKH res inter alios acta as far as the Fund is concerned.*

*[20] Moreover, as Mr. Polgieter accepted on behalf of the Fund, there is no question of Ms Lechner receiving double compensation by virtue of the German legislation referred to earlier. Instead he submitted that the ultimate question in this matter is whether the Ms Lechner's expenses are to be paid for by the South African or German taxpayer. He further submitted that it would be contrary to public policy for*

*this country's taxpayers to reimburse the KKH for expenses incurred in the execution of its statutory mandate.*

*[21] In my view, Mr. Potgieter misstated the position. By virtue of the provisions of the SGB referred to in para 4 above, Ms Lechner is obliged to repay the KKH. So she will not receive more than she was entitled to receive. The South African taxpayers will pay no more than they would have had to pay because Ms Lechner is obliged by the German legislation to repay the KKH – it is not as though the Fund has to pay the KKH as well as Ms Lechner. The KKH (not the German fiscus), which is out of pocket, will be reimbursed; and the KKH needs the reimbursement in order to continue to fund claims by its members.<sup>13</sup> This outcome is, in my view, neither unfair nor troublesome from a public policy perspective. The appeal must therefore fail.*

[29] Applying this to the present matter, the defendant's argument appears to be that the disability grant is deductible because Mokoena will not repay (refund) the Social Security Assistance Agency the amounts that he has already received which then will be a double compensation for him.

[30] Does this mean that the courts will act as collection agents for the Social Security Assistance Agency (SASSA)? If that is so, then the defendant will have to do better in its presentation for a deduction of RAF awards to cater for this kind of situations. I have already highlighted the deficiencies in the present matter such as the calculations relating to the amount to be deducted. The defendant would fail on the facts even if I am wrong on the analysis of the relevant authorities.

### **Costs**

[31] If this issue had been properly ventilated in the pleadings, I am certain that both parties would have been better prepared and that it would not have proceeded to trial. The manner in which it was raised, argued and persisted with even in the face of the judgment of Mavundla J, which is binding on this division until it is set aside clearly shows lack of preparation and understanding of the *stare decisis* principles on the part of the defendant's

counsel and her legal team. There was no attempt to distinguish or argue for a deviation from Mavundla J's judgment except as I have indicated. A concession was ultimately made, after a long exchange where I was almost accused of stifling the defendant's submissions.

[32] The trial was allocated for two (2) hours only and only on the issues of contingencies and general damages. No argument was advanced with regard to the former and only a moment's mention of the latter to the effect that an amount of between R1 200 00.00 and R1 250 000.00 was reasonable. The basis thereof was because in a 'similar'<sup>11</sup> matter where there was an apportionment of 70-30% general damages were awarded on that amount.

[34] I initially thought of calling on the legal representatives of the defendant to give reasons why they should be entitled to fees for the second day of trial when the matter was allocated for 2 hours. The counsel argued that the 2 hours were wasted by the plaintiff's counsel when he addressed the court on issues that were common cause and that she only got to address long after the expiry of the allocated time.

[35] This submission is disingenuous because as I have already stated above, the defendant raised an issue that was not anticipated. It required proper ventilation and quick research of the authorities.

[36] I abandoned the idea of seeking an explanation from the representatives of the defendant because it was clear and it is common cause that instructions from RAF rarely come in time, leaving representatives in a state of uncertainty and often embarrassment.

[37] Counsel for the plaintiff referred me to various authorities on the mandate of legal practitioners to settle matters where there are no real disputes. Whilst I agree with this submission, it is problematic because these kind of claims often involve millions of rands per claim, which if practitioners

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<sup>11</sup> I was handed a copy of the judgment in the matter of George Tika Bogosi v Road Accident Fund (North West) Case No. RAF 4/2015.

were allowed to settle without instructions would have serious negative consequences not only for the RAF, but for the entire country's economy.

[38] On the other hand, plaintiffs should not be exposed to the risk of incurring unnecessary costs whilst the matter is standing down for instructions or when the defendant's representatives drag out the proceedings by raising disputes that have not been properly ventilated in the pleadings.

[39] A cost order on an attorney and client scale is not an easy one to make, moreso when the money comes from the public purse. However, it is the only way to ensure that the defendant gets actively involved in the litigation because as I have stated a million times, the RAF instructions rarely come in time. Cases are settled at the doorstep of court rooms. If it is the competency of the legal practitioners that resulted in the situation where matters are not properly ventilated in pleadings, the defendant must take steps to ensure that its cases are presented in an effective and efficient manner.

[40] In the matter of S v Mafua and Others 2008 (2) SACR 653 (W), the appeal court, per C.J Claassen J discussed amongst others the question of effective legal representation. It is the litigant's rights to effective legal representation that are at stake as it appears from an extract from the following passages in this judgment.

[23] In para [14] of his judgement in S v Halgryn 2002 2 SACR 211 (SCA), Harms JA illuminated the constitutional right to legal representation as follows:

*"The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper effective or competent defence .... Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend on the degree of ex post facto dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hind sight .... The Court must place himself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect .... The failure to take certain basic steps such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited."*

[24] *The idea of being represented by a legal adviser cannot simply mean to have somebody stand next to one to speak on one's behalf. Effective legal representation entails that the legal adviser acts in the client's best interests, saying everything that is needed to be said in the client's favour and calling such evidence as was justified by the circumstances in order to put the best case possible before the court in the client's defence.<sup>6</sup> Implicit in the rights entrenched in section 35(3)(f) of the Constitution is the concept that legal assistance to the accused person must be real, proper and designed to protect the interests of the accused. The legal representative has an obligation to conduct the case in the best interest of the client while still ensuring that the inherent duty towards justice is maintained. In order to be able to conduct a trial in such manner the legal representative has to acquaint him- or herself with the charges, the facts with which the accused is confronted and more importantly, the version of the accused.<sup>7</sup> The principles just set out accord with the concept of the right to effective legal representation in an open and democratic society. In similar vein are the remarks of Justice Blackmun in **Burger v Kemp** 483 US 776 (1987) at 800:*

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*"The duty of loyalty to a client is 'perhaps the most basic' responsibility of counsel and 'it is difficult to measure the precise effect on the defence of representation corrupted by conflicting interests'".*

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[41] The issue that was raised whilst plaintiff's counsel was on his feet should have been properly investigated. The defendant was a respondent in the Constitutional matter of Coughlan N.O and knows or should know if there are any other gaps arising from that judgment that need to be closed.

The manner in which the issue was raised by its counsel indicates that the defendant does not take lessons from court judgments. If it did, the issues would have been properly investigated and the starting point should have been this judgment, which clearly counsel was not even aware of.

[42] It is for all these reasons that I decided to make an order of costs on an attorney and client scale against the defendant.

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**Order;**

[43] Under the circumstances, I make an order in terms of the draft marked 'XY' which is incorporated into this judgment.



TAN MAKHIWELE J.

Judge of the High Court

**APPEARANCES:****PLAINTIFF:****ADVOCATE CH VAN BERGEN**

Instructed by:

Munro Flowers &amp; Vermaak

C/O Prinsloo –Van der Linde Attorneys

Lynnwood

PRETORIA

**DEFENDANT:****ADVOCATE HL KELAOTSWE**

Instructed by:

Diale Mogashoa Attorneys Inc

Menlyn

PRETORIA

Heard on :

17 May 2019.

Judgment delivered on:

04 July 2019.