MT v Road Accident Fund; HM v Road Accident Fund [2021] 1 ALL SA 285 (GJ)

Adverse findings against experts and legal practitioners without evidence or a hearing

1 Introduction

The conversion of settlement agreements into court orders have existed for a long time, with a strong tradition in law [*Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) 95]. Substantive law favours a contract of compromise and courts generally accommodate settlement-based orders [*Ex parte le Grange* 2013 (6) SA 28 (ECG) para 37 & 41] which avoids protracted litigation, save costs and scarce court resources [*Eke v Parsons* 2016 (3) SA 37 (CC) para 19-23].

2 Court's *imprimatur* in settlement agreements

A court must adjudicate a matter that it is seized with unless the parties withdraw the matter [*PM obo TM v RAF* 2019 (5) SA 407 (SCA) para 14]. When parties seek the *imprimatur* of the court, the court's jurisdiction is not terminated: The court has a discretion to make the agreement a court order [*PM obo TM supra* para 14 &16] with due regard to: (1) the settlement order must be competent and proper [*Eke supra* para 25-26], (2) relate directly to the *lis*, (3) not be legally or practicably objectionable [*Eke supra* para 25-26] and conform to the Constitution and law [*Airports Company v Big Five Duty Free* 2019 (2) BCLR 165 (CC) para 13]. An order must not offend public policy or be *contra bones mores* [*Fagan v Business Partners* 2016 JDR 0317 (GJ) para 19 & 26].

In making settlement orders, the court must act as stewards of resources: Its institutional interests are not subordinate to preferences of litigants and the court may reject a settlement outright [*Le Grange supra* para 47]. There is a need for courts to retain a degree of control and to scrutinise such agreements to ensure that the terms of the agreement take up the status of an order where the court's discretion must be exercised on a case-by-case basis so as to strike a balance between considerations relevant to the court's discretion [*Le Grange supra* para 41]. In doing so, the court must consider the wider impact the order may have [*Buffalo City Metropolitan Municipality v Asla Construction* 2019 (4) SA 331 (CC) para 37] on the public when public funds are disbursed [*PM obo TM supra* para 33]. In matters involving public funds, such scrutiny is essential and the courts are enjoined by the Constitution [s173] to ensure that the process is not abused [*PM obo TM supra* para 35].

The Road Accident Fund ('RAF') is an organ of state and bound to adhere to the basic values underlying governing principles and public administration underscored by the Constitution [*PM obo TM supra* para 34]. Settlements involving organs of state must be transparent and

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accountable [*Khumalo v MEC of Education KZN* 2014 (5) SA 579 (CC) para 62; *Mvoko v SABC* 2018 (2) SA 291 (SCA) para 32-35]. A high standard of professional ethics, and the efficient economic and effective use of resources are apposite [Constitution, s195(1)(a)-(b)].

3 Summary *MT v RAF; HM v RAF*

In *MT v Road Accident Fund; HM v Road Accident Fund* [2021] 1 All SA 285 (GJ), two claimants, Taylor and Matonsi settled their RAF claims and asked the court to remove their matters from the roll as opposed to making it an order of court [para 2]. Fisher, J held the parties and their attorneys, dubiously, in concert with each other [para 1] endeavoured to escape the court's *imprimatur* and oversight, in what Fisher, J described as the latest gambit in the RAF fraud milieu [para 2, 15 & 18]. Fisher, J held the conduct was becoming a trend, despite the court's attempt to foster and maintain judicial oversight [para 3], to safeguard against venality and incompetence in a public body, the RAF [para 14 & 17].

This scathing judgement joins a chorus. In *Mzwakhe v RAF* [(2017) ZAGPJHC 342] the court expressed concern over a large settlement divorced from the proven injuries [para 23-25]. In *Ketsekele v RAF* [2015 (4) SA 178 (GP)] the actions of attorneys were held to lack *prima facie* probity where honesty towards the court and the interest of the client were sacrificed on the personal-enrichment-altar [para 36].

In her judgement, Fisher, J heeds a cautionary tale (in the context of the survival of the RAF) to vulnerable South Africans reliant on it [para 1]: The RAF compensates victims for damages caused by motor vehicle accidents [RAF Act 56 of 1996, s4(1)(b)]. The RAF is thus a critical organ of state that provides fair and effective social security [para 5] in protecting and fulfilling the state's constitutional duty of security of a person [*RAF v Mdeyide* 2011 (2) SA 26 (CC) para 66 & 80; *LSSA v Minister of Transport* 2011 (1) SA 400 (CC) para 54].

Fisher, J held that courts work tirelessly to stem the tide of fraud [para 15] and corruption [para 17]. In terms of the practice directive courts are compelled to interrogate every settlement to ensure its premise is justified [para 22 & 68]. Fisher, J held that in the two matters before her, the RAF would have been better off not settling with the Plaintiffs and allowing the court to consider the merits of the case on a default judgement basis [para 124]. Fisher, J was concerned that the RAF ignored her contentions and conducted litigation recklessly under insolvent circumstances [para 128]. The RAF, on the verge of total collapse, terminated the service of their legal representatives in May 2020, to save legal costs [para 9 & 32], which deprived the RAF of the resources and assistance that these firms offered [para 32 & 46]. Being unrepresented exposes the RAF to a larger scope of malfeasance, incompetence [para 10] and manipulation [para 17], a notion that does not escape the realm of exploiters of the RAF, where the two matters *in*

casu is a gleaning example of this [para 17] and of a failing system when scrutiny is not applied by the RAF [para 47].

Fisher, J held [at para 33] that:

> "… there had been a general instruction from superiors in the RAF to settle all trials. It seems that this may be preparatory to a new regime which is hoped for in the form of the RABS. However, as these cases show, such an approach, if not properly managed, is a recipe for abuse of the Courts' process, the provisions of the RAF Act, the PFMA and ultimately of the Constitutional prescripts to which the RAF and those that serve and interact with it are bound."

This directive is dependent on claim handlers, where the command chain is as strong as its weakest link [para 46], to approving copious settlements daily, and who must rely on the settlement motivations prepared by the Plaintiff attorneys, for accurate information [para 47 & 73] in order to decide on the conduct of the matter.

Fisher, J held that claims handlers ought to rely on proper facts, free from the attorney's machinations [para 54], which accord with the evidence: It should not be false, a courtesy that the court too should be afforded [para 47 & 73]. Plaintiff's attorneys should maximize the amount for the Plaintiff, but not by resorting to chicanery [para 47] as was the case *in casu,* [para 54] in breach of the attorney's duty, as officers of the court, not to mislead the RAF [para 97]. The incentive for the attorney lies in the contingency fee agreement: The higher the settlement, the bigger their fee [para 31].

Although Fisher, J did not express her comment on RABS, she pointed out that RABS is an attempt to rectify a universally deplored unjust and inefficient RAF [para 13]. RAF litigation is vulnerable to corruption owing to people litigating with a seemingly endless supply of state funds and not their own money, a fact which makes litigants careless while broadening the scope for malfeasance [para 15]. The RAF is an attractive target for fraudulent syndicates and individuals [para 16]. The claim for general (non-pecuniary) damages provides a wider scope for misrepresenting facts [para 30]. The RAF usually has no version to the facts and assessors are not used, to curb fees, allowing the claimant's version to be accepted on face value [para 45].

In casu, Fisher, J held that the same attorney in both matters submitted a detailed written proposal to the RAF containing both a significantly inflated proposal [para 73 & 101] and a deliberate misrepresentation of facts [para 85, 97 and 101], something that the court found important in the achievement of the settlement [para 59].

4 No factual basis for the Court's findings

Fisher, J relied heavily on the RAF's Annual Report [fn 4 – 5 & 13, para 12, 16 & 30 – 31], an affidavit deposed to by the RAF's CEO [para 11], news reports [para 13] and documents in the court file, none of which

amounted to admissible evidence before the court. Notwithstanding the court's findings and/or inferences not being premised on admissible evidence and despite no formal hearing being held, the following baseless findings were made:

i. Attorneys in general employ touts to source clients, in exchange for cash such as ambulance and tow-truck drivers, paramedics and police officers [para 24].

ii. Of the RAF disbursements, 28% goes towards Plaintiffs attorneys as opposed to their clients [para 31].

iii. Experts are employed by parties on the basis that fees of experts are contingent on the outcome of the trial [para 36].

Additionally, Fisher, J [at para 63] was not at liberty to rely, as she did, on collateral facts contained in the Defendant's unconfirmed [para 66] expert report [para 61]. Even if this unconfirmed expert opinion was tendered as evidence (it was not), the collateral information encapsulated therein amount to inadmissible hearsay evidence [*Coopers v Deutsche Gesellschaft* 1976 (3) SA 352 (A) 371G; *Reckitt & Colman v SC Johnson* 1993 (2) SA 307 (A) 315E; *Lornadawn Investments v Minister van Landbou* 1977 (3) SA 618 (T) 623; *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) 772I].

The judgement made by Fisher, J, closely resembles the dicta of *Motswai v RAF* [2014 (6) SA 360 (SCA)], where the SCA took a dim view of the findings of the court *a quo* (per Satchwell, J) who relied on inferences and submissions from counsel in chambers [para 30] and made findings without any evidence [para 46]. As in *Motswai*, Fisher, J made sweeping findings against the professionals who rendered services, without a proper hearing or a factual basis [*Motswai supra* para 22 & 26]. It is trite law that in making findings which carries serious consequences, such as fraud, the clearest satisfactory evidence is indispensable [*Motswai supra* para 46; Christie *The Law of Contract in South Africa* 5ed 295; *Gates v Gates* 1939 ASD 150 155; *NDP v Zuma* 2009 (2) SA 277 (SCA) para 27]. The documents before Fisher, J at best raised efficacy and cost related questions, but the court was not entitled, without more, to draw inferences and reach conclusions, obvious as they may seem, from these documents [*Motswai supra* para 46].

5 The *audi ad alteram partem* rule

The law is strewn with examples where apparent open-and-shut cases are not open-and-shut, unanswerable charges are competently answered and inexplicable conduct explained [*John v Rees; Martin v Davis* [1969] 2 All ER 274 309]. It is for this reason that the *audi ad alterem partem* maxim is apposite. Peach [*The Application of the Audi Alteram Partem Rule to the Proceedings of Commissions of Inquiry* (LLM dissertation 2003 UP) describes this maxim [page 8] to imply:

> *"that a person must be given the opportunity to argue his case. This applies … to any prior proceedings that could lead to an infringement of existing rights,*

> *privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party."*

Fisher, J made *inter alia* the following adverse findings against experts and legal practitioners without heeding the maxim, as the persons who are implicated in the adverse findings were not given an opportunity to put their version of events before the court:

i. Legal representatives acted under circumstances strongly suggestive of dishonesty and gross incompetence [para 3].

ii. The firm that represents both claimants has a business pattern [para 18].

iii. Attorneys are generally guilty of exploiting the RAF, learning tactics from each other [para 18].

iv. Legal practitioners were well acquainted with the force of the contents of the settlement proposal and its (mis)representations [para 74 and 97].

v. Dr Scheepers grossly overstated injuries [para 80].

vi. Mr Kramer, the actuary, used patently false information in his calculation and misstated objective facts in his report [para 89].

vii. Legal practitioners extracted an offer from the RAF [para 96] which was significantly inflated [para 70].

viii. Dr Berkowitz's opinion was inaccurate if not deliberately false [para 117].

ix. The RAF conducts its business recklessly [para 128].

The professionals on the receiving end of the adverse and scathing findings by Fisher, J had a right to provide an explanation to the allegations, with the benefit of legal counsel, with the right not to self-incriminate themselves and to heed attorney and client privilege [*Friedemann v RAF* (2459/12) [2017] ZAKZDHC 44 (13 December 2017) para 39].

The reputation and integrity of various professionals have undisputably been tarnished by the court's judgement without their respective submissions being heard. In *Motswai v RAF* [2013 (3) SA 8 (GSJ)] Satchwell, J [pages 34-36], held that an attorney acted dishonestly and fraudulently, that he fabricated a claim, made misrepresentations in pleadings, specifically that the injured suffered a fractured ankle whereas the injuries were less severe, all with the intention to enrich his firm and himself, and to benefit the experts in abusing the RAF compensation system [see *Motswai (SCA) supra* para 6, 15 & 17). That case, just like the matters *in casu*, entail serious consequences for those involved and received wide press coverage [*Motswai (SCA) supra* para 7].

Similarly, to *Motswai* where Satchwell, J took the view that predatory legal practitioners, administrators and medico legal experts enriched themselves at the expense of the RAF [*Motswai SCA* supra para 22], FISHER J too made sweeping adverse finding against similar professionals. In doing so, Fisher, J ignored *NPA v Zuma* [2009 (2) SA 277 (SCA) para 19] where the court held:

> "The independence of the judiciary depends on the judiciary's respect for the limits of its powers. Even if, in the words of the learned judge, the judiciary forms a 'secular priesthood' this does not mean that it is entitled to pontificate or be judgemental especially about those who have not been called upon to defend themselves – as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues".

Fisher, J should have followed the directive in *Motswai* and postponed the matters and ordered the legal practitioners (and the experts) to address the court's concerns regarding the propriety and management of the claims under oath in a formal hearing. Her judgement was irregular and unfair: for the mere fact that sweeping findings are made against individuals who had no chance to defend themselves, the judgement cannot stand [*Motswai SCA supra* para 45]. The adverse finding flies in the face of:

i. The *Chief Justice's Judicial Norms and Standards* [GN 37390, GG 28/2/2014 issued in terms of s165(6) of the Constitution and s8 of the Superior Courts Act], which aims to affirm dignity to court users [para 2]. Judicial officers should be courteous and accord respect to all with whom they come in contact [para 5.1(vii)].

ii. The *Chief Justice Service Delivery Charter* [available at file:///C:/Users/ferdi/Dow nloads/OCJ-Service-Delivery-Charter_Booklet%20(4).pdf, accessed 29 April 2021], which requires of the judiciary high levels of courtesy by adhering to norms and standards [para 1.7(d) & 5.3(d)]. Courts are to deal with people professionally and accord fair and equal treatment [para 5.3(a)], with due regard to human dignity [5.3(c)], where people are to be heard by an accountable and impartial presiding officer that has integrity and free from bias [para 5.3(c)].

iii. The *Code of Judicial Conduct* [GN 35802, GG of 18 October 2012], which notes that courts must at times express critical views of others, but harsh language should be avoided, and a judge may not under the guise of judicial functions make defamatory and/or derogatory statements [note 9(v)]. A judge must act honourably in a manner befitting the office and avoid impropriety [art 5(1)], uphold independence and integrity [art4(a)], act courteous and respect the dignity of others [art 7(c) & 9(b)(iii)], refrain from bias and prejudice [art 7(d)] and remain impartial [art 9(a)(ii)]. A judge must ensure a fair trial and resolve disputes based on facts with a duty to observe the letter and spirit of the *audi ad alteram partem* rule [art 9(a)(i)]. Before adversely commenting on the conduct of a practitioner, that practitioner must be afforded an opportunity to address the allegations [art 16(2)].

6 General damages

(a) The legislative framework

A third party wishing to claim general damages, must be submitted to a medical practitioner [RAF Act, s17(1A) read with Regulation 3(3)(a)] to obtain a serious injury assessment report [Reg 3(3)(a)] defined as an RAF 4 form [Regulation 1(x)]. A medical practitioner is one who is registered under the Health Professions Act 56 of 1974 [Regulation 1(viii)]. In completing the RAF 4 form, the medical practitioner must have regard to the American Medical Association Guideline in completing the Evaluation of Permanent Impairment [Reg 3(1)(ii) & 3(1)(v)] to establish if the third party reached a 30% Whole Person Impairment (WPI) to qualify for general damages [Reg 3(1)(b)(ii)].

If the claimant's WPI falls below 30%, the medical practitioner must have regard to the '*narrative test*' [Reg 3(1)(b)(iii)]. The principles set out in the HPCSA Narrative Test Guidelines is apposite [Edeling *et al* "HPCSA serious injury narrative test guideline" 2013 South Africa Medical Journal 103(10) 763-766] as the RAF Act and Regulations gives no guidelines on the narrative test [Slabbert & Edeling "The Road Accident Fund serious injury: The narrative test" 2012 Potchefstroom Electronic Journal 23]. Guidelines include: the relevant and altered circumstances of the injured [para 2.2 & 2.3], changes in performing basic and advanced activities of daily living [para 2.4.4], impact on life roles such a parenting [para 2.4.4], the impact on independence [para 2.4.4], impact on educational status [para 2.4.4] and employment status [para 2.5].

The *Edeling Guideline* stresses that the variable and subjective suffering of claimants are not tangible and objective but abstract and difficult to measure: General damages relates to pain, suffering, loss of enjoyment, all subjective and abstract attributes [para 2.4.5]. The guidelines are clear: the RAF 4 must include the judgement of the medical practitioner as to the credibility, congruence and consistency of subjective complainant and the nexus with the accident [para 2.4.5].

(b) Qualifications of RAF 4 medical practitioners

Both Dr Scheepers and Dr Berkowitz, both registered medical practitioners, were well qualified to complete the RAF 4 forms, owing to their status as medical practitioners as defined by the RAF regulations and the court erred to suggest that they were underqualified [Para 80 & 123].

(c) The RAF and not the Court decide on the seriousness

Fisher, J held that Taylor's representatives disregarded the orthopaedic surgeons' joint minute, finding her injuries non-serious [para 64 & 79] connoting the end of any general damages claim [para 64]. Taylor's reliance on a qualifying RAF 4 by a general practitioner [para 80] did not find favour with Fisher, J holding he is no expert in urology or

orthopaedic injuries, he grossly overstated the injuries, and his findings are at odds with other expert reports [para 80]. Fisher, J held that there is no basis to rely on his report to establish the quantum [para 80].

Mathonsi relied on a qualifying RAF 4 by the same GP and a plastic surgeon [para 116]. The court held that the report by the plastic surgeon was inaccurate if not deliberately false because a different expert opined that there was '*no disfigurement*' [para 117]. In the court's *opinion*, the injury did not amount to serious disfigurement, and held that *Mathonsi* does not qualify for general damages [para 117 & 122].

The court's finding that the injuries of both claimants were not serious amount to judicial overreach. It is the RAF that must be satisfied that the injuries have been correctly assessed [Reg 3(3)(c)]. The SCA in *RAF v Duma* [2013 (6) SA 9 (SCA)] held that the model which the legislature chose in deciding whether the third party's injuries are serious or not, confer the decision on the Fund and not the court [para 19]. The SCA in *RAF v Faria* [2014 (6) SA 19 (SCA)] at para 34 held:

> "*In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts*".

The RAF, in offering general damages in both matters, administratively accepted the fact that the Plaintiff's injuries are serious. Fisher, J could not competently interfere with an administrative decision by the Fund, amounting to judicial overreach [Kehrhahn "RS v Road Accident Fund (49899/17) [2020] ZAGPHC (21 January 2020)" 2020 De Jure 188 192].

(d) Employing piable experts to secure a RAF 4 qualification

Fisher, J held that pliable medical practitioners are employed by claimants to reach the general damages qualifying threshold [para 123]. Fisher, J disregard the flip side of the coin: legal practitioners who omit to thoroughly investigate a third-party claim by *inter alia* appointing the necessary experts, face professional negligent and damages suits [*Motswai SCA supra* para 52] and unethical investigations. There can be no culpability on the part of a legal practitioner in soliciting a further RAF 4 assessment where another practitioner held injuries to not meet the qualifying criteria, (perhaps from a different discipline), if the practitioner reasonably believes a medical practitioner to have erred or provided a limited RAF 4 form. This conduct is in fact prudent.

The affiliation between experts and litigants are complex: litigants must employ all reasonably available means to adduce the best evidence to advance its case [Gross "Expert testimony" 1991 Wisconsin Law Review 1113 1125 & 1130], even if this means seeking an expert whose views conform with that of the litigant [Malsch & Frecelton "Expert bias and partisanship: A comparison between Australia and the Netherlands"

2005 11(1) Psychology, Public Policy and the Law 42 48], a notion that Fisher, J accepts [para 47]. In an adversarial system, lawyers must advance their client's interest and will instruct experts who will support their case [Meintjies van der Walt "Experts testifying in matters of child abuse: The need for a code of ethics" (2002) 3(2) Child Abuse & Research in SA 24 24]. Legal practitioners must prepare the evidence and it will be partial, intelligent and cunning: the system cannot provide legal practitioners with this role and then cripple their ability with restrictions. [Gross *supra* 1137.] Lawyers can do anything in preparing witnesses short of buying the witness, suborning perjury [Gross *supra* 1137] or committing a crime.

(e) All injuries must be considered in assessing seriousness

Specialists often complete RAF 4 forms exclusively from their specialist discipline. GP's tend to follow an all-encompassing approach. In the matter of *Skosana v RAF* [Unreported judgement of the High Court of South Africa, Gauteng Division, Pretoria (case number 3204/2015)], Sardiwalla, J held that once a claimant's injuries qualify as serious, the court must consider all the injuries in assessing the quantum for general damages, and not only the individual qualifying injury. Even injuries on the non-serious list must then be considered [Regulation 3(1)(b)(i) lists these injuries].

7 The settlement agreements sunject to review: No injuries suffered

Fisher, J held that when the RAF (a public administered body) litigates, it constitutes an exercise of public power, which must be constitutionally compliant, uphold the maxim of legality and the rule of law [para 128]. The RAF's settlements must be lawful, compliant with the RAF Act [56 of 1996, as amended] and the Constitution [para 127]. Disbursements of funds must be efficiently, economical and effective [para 127]: The Public Finance Management Act [Act 1 of 1999] applies to the RAF [para 130] with all its onerous prescripts [See s2, 50, 51 and 57].

Fisher, J held that it stands to reason that without loss or damages, the RAF have no power to settle a matter and to do so would be *ultra vires* [para 8]. *In casu* however, there can also be no rational finding that there were no damages *in casu*. Even if a claimant cannot prove a claim for general damages or loss of earnings, the undertaking to compensate for future medical expenses [RAF Act 56 of 1996, s17(4)(a)] allows a claimant to recover whatever is paid for treatments, even in private medical care [*Motswai SCA supra* para 56]. A litigant cannot be criticized for prosecuting a claim, even for an undertaking for future medical costs, and by implication consulting experts to make a case for future medical expenses [*Motswai SCA supra* para 56].

The net result of the judgement is that Fisher, J left the Plaintiffs in a quandary by finding the settlement agreements void *ab initio* [para 129],

unenforceable and worthless [para 130] owing to the RAF's officials unlawful conduct and collusion on the one hand, where payments of the settlement amounts would amount to irregular expenditure on the RAF's part [para 130], whilst on the other hand finding that the court cannot interfere with the settlements unless they are before her for review, which it was not [para 131].

There was no evidence before the court that the RAF acted unlawfully, and the court misdirected herself in declaring the settlement agreements null and void. In an *obiter*, Fisher, J suggest an audit may reveal similar unlawful settlements which will be subject to review [para 130]. The unlawfulness of the RAF's conduct was not before the court. Parties determine the issues before the court in the pleadings: it is impermissible and contrary to the court's character to pronounce upon a claim or defence not raised in pleadings [*Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) 898; *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) para 13 & 14].

8 Nexus

Fisher, J erroneously held that Taylor's knee injury, diagnosed by Dr Volkersz, an opinion under oath [para 66] was not-accident related [para 80] owing to the absence of any evidence of a knee injury, but for Taylor's *ipse dixit* [para 78]. It is contentious when an injury is not recorded in the hospital records [*M v RAF* (55471/2012) [2017] ZAGPPHC 561 (24 August 2017); *Ndlovu v RAF* 2014 (1) SA 415 (GSJ) at 438], however *in casu* there was no evidence that the knee injury was pre-existing, and hospitals may omit injuries from the records. In *Mkhonta v RAF* [(20703/12) [2018] ZAGPPHC 471 (29 March 2018)] the court relied on a missed injury [para 7.12].

9 *Jones v Kaney*

Just as Hodgkinson and James [Expert Evidence: Law and Practice (2007) 13-010], Fisher, J, encourages the abolishment of expert's witness immunity against professional negligent lawsuits, to achieve '*a chastening effect on experts'* [para 37]. The rationality for such an immunity against suit has its foundation in the fact that an expert's duty towards the court may be in conflict with their client's interest which provide the expert with deserving protection from suit [*Re N* [1999] EWCA Civ 1452 (20 May 1999) 17]. In the UK dicta of *Jones v Kaney* [2011 UKSC 13] this immunity was abolished. In *Jones,* an expert was sued for professional negligence by the same litigant that instructed the expert, for making a joint minute concession to his detriment.

Fisher, J seems not to have considered that abolishing this immunity can have the effect that experts will not give reasonable and objective opinions or will not make reasonable concessions to the detriment against the instructing litigant and will instead stick to their proverbial guns out of fear of conviction and lawsuits: immunity of suit may encourage greater pre-trial conferment among experts [*Stanton v*

Callaghan [1998] EWCA Civ 1176 (8 July 1998)]. This is a matter for further research.

10 Belated Rule 28 amendments

Fisher, J held the late '*significant*' amendment of the amount claimed was designed to inflate the claims [para 61]. The service of the amendments was contentious [para 94 & 108], considering it was electronic service, the lay RAF official did not have the assistance of an attorney [para 109] and the amendment came *ex post facto* to the judicial certification [para 122]. The amendment was held not effected [para 94], a finding devoid of cogent reasoning on the part of the court who simply held that the amendment was *beset with complexity both procedurally and on the merits* [para 94]. Fisher, J should have given reasons for this finding. In *Strategic Liquor Services v Mvumbi* [2010 (2) SA 92 (CC) at 96G] the court held:

> "It is elementary that litigants are ordinarily entitled to reasons for a judicial decision … written reasons are indispensable. Failure … will usually be a grave lapse of duty, a breach of litigants' rights ..."

It is common practice for RAF attorneys to claim nominal amounts when drafting pleadings [*Motswai SCA supra* para 19] only to quantify a claim after *litis contestatio*: a notion not inherently objectionable [*Motswai SCA* supra para 50].

Pleadings may be amended at any stage before judgement [Theophilopoulos *et al* Fundamental Principles of Civil Procedure (2006) 261]. The RAF terminated the services of its legal representatives, leaving service of the amendment on the RAF directly. In law, the claims handler, just like any other litigant, need not be qualified or be authorized to receive such processes as suggested by Fisher, J [para 94]. Electronic service is authorized by the Uniform Rules [Rule 4A(1)(c)]. The Gauteng Division COVID 19 Practice Directive allows a party to effectively serve a document by merely placing it on Case Lines (the court's electronic court file) which will be deemed proper service and filing, alternatively transmitting service via e-mail [Directive 117.2.1-.117.2.2]. This directive was extended indefinitely on 2 August 2020.

11 Courts' opinion on RAF'S inner workings

Fisher, J held the RAF system is unworkable, unsustainable and corrupt [para 13], and expresses the following: '*In my view, the fund should be liquidated and/or placed under administration as a matter of urgency. This is the only way that this hemorrhage of billions of rands in public funds can be stemmed …*'

The judiciary, as the judicial arm of state [*PM obo TM supra* para 14] have the constitutional right to freedom of belief and opinion [s15] and expression [s16]. Judicial speech, such as the court's personal views on the RAF's future is complex: Convictions and opinions expressed by the court (who represent ideas of the rule of law) is deemed conferred with

characteristics of honesty, integrity and wisdom and carry authoritative weight and meaning when compared to opinions of others [Dijkstra "The freedom of the judge to express his personal opinion and convictions under the ECHR" 2017 13 Utrecht Law Review 1 1]. The constitutional rights of the court are not unlimited, especially considering the potential it has to adversely affect the efficiency of the judiciary and the rule of law [Dijkstra *supra* 1]. Judges are not to do anything that they cannot in principle justify: even though courts may rely on personal moral convictions, they have an institutional responsibility of integrity [Dworkin "The judge's new role: Should personal convictions count" 2003 1 Journal of International Criminal Justice 4 11]. Courts should avoid advocacy and put aside emotions and personal feeling in judgements, free from contention where humility is the mark of objectivity and fairness [Chief Justice Malaba 'Judgement writing and draft order' (2019) 25].

The RAF was created by the RAF Act [56 of 1996]. This Act makes no provision for the RAF to be liquidated or being placed under administration. There is no legal basis for the liquidation or administration of the RAF. It is unjustifiable for Fisher, J to adopt such a view if the RAF Act makes no provision for the liquidation or administration. If the court's opinion were to be realized, section 21(1)(a) of the RAF Act [56 of 1996] will mean that the common law liability of drivers and owners of vehicles will be reinstituted, in contradiction of the court's view that the safeguard of the RAF is important [para 1]. This may create a social catastrophe.

12 Conclusion

The lengthy judgment is strident and evangelical [*Motswai SCA supra* para 22]. The subtext of the court's *dicta* adopts in general a suspect, cautionary and accusatory tone, wherein RAF litigation in general and its role-players are castigated of a myriad of suspicious wrongdoings. The court was scathing in her trenchant critique of how RAF claims are approached with perhaps an attempt at a remedy and deter the abuse [*Motswai* SCA supra para 22]. Fisher, J conceded her general sense of dishonesty and cavalier conduct [para 118] by various role-players, which warrant investigation [para 132]. The fact that further investigations are warranted support the fact that the court's findings were premature and without evidence.

The judgment is fraught with an undertone (by direct findings of wrongdoing and innuendos) of fraud, deception, corruption and ill-discipline. The court seems to take a proactive step in accepting a responsibility to eradicate all wrongdoing in RAF litigation by naming and shaming such wrongdoers. While the court's concerns may be legitimate and real in general there was no evidence to justify the court's findings *in casu*.

An injustice was caused against the professionals who were censured and castigated who may be condemned and will face serious repercussions by the adverse judgement: It may threaten their livelihood (financial damages) and reputations [*Motswai SCA* supra para 59]. The Constitution [s165(1)] vest judges with tremendous power but the court's function must be exercised judicially and within the ambit of the law [*Motswai SCA supra* para 59].

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