THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 75/03

Reportable

In the matter between :

ROAD ACCIDENT FUND APPELLANT

and

B SHABANGU & ANOTHER RESPONDENT

CORAM : MARAIS, ZULMAN, CAMERON, CLOETE JJA, SOUTHWOOD AJA

HEARD : 16 MARCH 2004

DELIVERED :

Summary: No legal duty owed to the Road Accident Fund by an attorney who innocently submits a claim on behalf of an impostor. In any event no negligence established. Liability limited to fraud.

JUDGMENT

CLOETE JA/

CLOETE JA

[1] The question which arises in the present appeal is whether an attorney and his firm, who innocently submitted a claim for compensation to the Road Accident Fund ('the Fund') on behalf of an impostor claiming to be the widow of a person killed in a motor vehicle accident and the mother of his children, are liable to repay to the Fund the amount for which the fraudulent claim was settled.

[2] The first respondent was one of two partners in the second respondent, a firm of attorneys. The respondents lodged a claim with the Fund for compensation in terms of the Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989 ('the Act'). The claim was made on behalf of a person ('the client') who pretended to be the widow, and mother of the children, of a man who she said had died in consequence of a collision between two motor vehicles. The Fund settled the claim and the first respondent, duly instructed by the client, signed a discharge form. The amount of the settlement, R258 593,00, was paid into the account of the second respondent and thereafter dealt with in accordance with the instructions of the client. It later appeared first, that the client was an impostor who had perpetrated an elaborate fraud

facilitated by the deceased's brother and a person in the employ of the Department of Home Affairs; and second, that in fact the fraud had gone further and even the deceased's dependants had no claim against the Fund, in as much as the deceased had been driving a vehicle which collided with a tree and no other vehicle had been involved in the accident which caused his death. I would say immediately that it has never been the Fund's case that the respondents were parties to the fraud.

[3] In the court below the Fund as the plaintiff sought, on various bases, to recover what it paid to the impostor from the respondents as the first and second defendants respectively. It also sought the costs it incurred in joining the respondents as third parties to other legal proceedings in which the true widow of the deceased had sued the Fund for compensation. Van der Walt J dismissed the Fund's action with costs and ordered the Fund to pay the respondents' costs incurred by their joinder in the other proceedings. Leave to appeal was sought after the learned judge was discharged from active service, and was granted to this court by another judge.

[4] On appeal the Fund pursued its claim on six alternative bases. The first was that the respondents had breached an express warranty

that they were acting on behalf of the true widow. This warranty was said to be constituted by the following clause in the discharge form signed by the first respondent:

'In my representative capacity I warrant that I am in possession of the requisite authority granted by or on behalf of the relevant claimant to sign this discharge form on his/her behalf.'

The submission on behalf of the Fund was that the phrase 'the relevant claimant' can only be interpreted as 'the correct claimant' – particularly as the power of attorney executed by the impostor was purportedly signed by the true widow (whose full names and identity number are reflected in the document) and in addition, the respondents, in the letter signed by the first respondent under cover of which the claim was submitted, stated that the second respondent acted on behalf of the widow. The letter gave the full names of the widow and continued:

'We refer to the above matter and confirm that we act on behalf of the abovementioned claimant whose husband, Steven Makgoba, was fatally injured in a motor vehicle accident on the 27th April 1996 and she has instructed us to lodge a third party claim for her personal claim as well as loss of support of the deceased's minor children.'

[5] The submission is without merit. The warranty in the discharge form constitutes an undertaking by the signatory, the first respondent,

that he was authorised to settle the claim on behalf of the client. That is the obvious and sole purpose of the clause. The clause does not embody a warranty that the client is the correct claimant. Far clearer language would have been necessary to achieve such a result. 'Relevant' claimant in the context of the clause means the person who had put forward the claim to which the discharge form relates, and no more. In simple terms, all that the first respondent warranted was that his client, on whose behalf he had submitted a claim, had authorised him to sign the discharge form.

[6] Reference to the power of attorney and covering letter takes the matter no further. Those documents, and indeed the conduct of the first respondent, cannot serve to widen the ambit of the warranty in the discharge form from an undertaking that the first respondent had authority to settle his client's claim, to an undertaking that his client was the person whom she claimed to be. Nor do the documents themselves contain such an undertaking.

[7] The second submission was that the respondents had tacitly warranted the identity of the claimant. There is no factual basis for finding that if the client was an impostor, the respondents tacitly undertook liability to the Fund for any damages which the Fund might

suffer. That is a far-reaching conclusion and therefore inherently improbable. I would be astonished if any attorney, were he to be asked by a hypothetical bystander: 'Should your client not in fact be the person whom she claims to be, do you undertake personal liability to compensate the Fund in damages?' would answer immediately and without qualification that that was indeed his or her intention. That is fatal to the submission. The authorities on the 'hypothetical bystander' test are collected in *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* [2004] 1 All SA 1 (SCA). An attorney who submits a claim on behalf of a client does not thereby and without more tacitly warrant the client's *locus standi* to make the claim any more than the attorney tacitly warrants the truth of the facts on which the claim is based or the correctness of the quantum of damages claimed.

[8] The third submission was that the respondents were bound to compensate the Fund because of the respondent's breach of warranty of authority. Because the answer to this submission is clear on the facts, it is unnecessary to consider the juridical basis of that remedy (*cf Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409C–D; *Ericsen v Germie Motors (Edms) Bpk* 1986 (4) SA 67 (A) at 87J). Academic opinion is divided: see for example N J van der Merwe '*Wanbeskouings*

oor Wanvoorstellings' (1964) 27 THRHR 194 at 199ff; S R van Jaarsveld *Die Leerstuk van Ratifikasie in die Suid-Afrikaanse Verteenwoordigingsreg* (LLD thesis Pretoria 1971) 428–441; Joubert *Die Suid-Afrikaanse Verteenwoordigingsreg* 79–81; De Wet en Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5ed 123; Harker '*The Liability of an Agent for Breach of Warranty of Authority*' (1985) 102 SALJ 596; Kerr *The Law of Agency* 2nd 301ff; Wanda *Lawsa* 2nd vol 1 para 218.

[9] It is plain from the facts in this matter that the first respondent had the authority which he warranted, i.e. that of his client, the claimant. That is an end of the matter. The implied warranty of authority in its ordinary form does not impose on an agent liability in damages to the third party with whom he contracts, if his principal does not have the right the agent asserts on the principal's behalf. This is because in the ordinary case an agent, by contracting as such, warrants his own authority to act as agent for the principal for whom he purports to act; he does not, without more, warrant to the third party that his principal is entitled to confer the right or obtain the benefit which is the subject matter of the contract concluded with the third party: *Ericsen* 87H–J, 88C–D and E–F. Where the principal does not have such an entitlement, and absent any agreement

between the agent and the third party that creates liability in the agent (which I have already held does not exist in the present case), the agent's liability, if any, must be sought in delict in an action based on negligence or fraud.

[10] The fourth claim was advanced on the basis that the respondents had negligently misrepresented to the Fund that they acted for the true widow. The fifth claim was advanced on the basis that the respondents were negligent in failing to ascertain the true identity of the client when they submitted the claim. The final claim was advanced on the basis that the respondents were negligent in failing to ascertain the true identity of their client before paying over the settlement amount on her instructions. The logically anterior question in each case is, however, whether the act or omission relied upon was wrongful i.e. whether the respondents owed a legal duty to the Fund; for if they did not, they would not be liable to the Fund and the enquiry into negligence does not arise. As Marais JA said in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1054 (SCA) para [9] (in dealing with an omission): '[T]he existence of *culpa* only becomes relevant sequentially after the situation has been identified as one in which the law of delict requires action'. In many cases it will be obvious that a legal duty is owed and the court will proceed immediately

with the enquiry into negligence. The present matter, however, first necessitates an enquiry into the question whether an attorney can owe a legal duty to a third person whilst carrying out the instructions of the client. I therefore proceed to that enquiry.

[11] The attorney-client relationship imposes a duty on an attorney to advance the interests of his client, even where that course will cause harm to the opposite party; and in general, an attorney will incur no liability to the party on the other side in doing so: *White v Jones* [1995] 2 AC 207 (HL(E)) 256C–D. In *Ross v Caunter* [1980] 1 Ch 297 Sir Robert Megarry V-C said at 322 B–C:

'In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb "properly", that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client. The duty owed by a solicitor to a third party is entirely different. There is no trace of a wide and general duty to do all that properly can be done for him.'

Of course the relationship and concomitant duty owed to the client will not protect the attorney civilly or criminally against unlawful conduct such as fraud. An attorney is not entitled nor obliged to advance his

client's interests at all costs. But, generally speaking, it is no part of an attorney's function to protect the interests of the opposite party by doing, or refraining from doing, something that might injure that party. Something more is required.

[12] It is impossible to lay down an all-embracing test as to when an attorney will be held to owe a legal duty towards a person other than the client particularly where, as here, that person relies on a negligent misrepresentation inducing a contract (here the contract of settlement) , or on negligent omissions on the part of the attorney to safeguard that person's interests when the attorney is performing the duty the attorney owes to the client. The question of wrongfulness that pertinently arises in each of such cases is essentially one of legal policy: *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 570D–F and J (misstatement); *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A—B and *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) [17] (omission).

[13] It is established in the jurisprudence of other countries that an attorney can be liable to a person with whom that attorney is not in a contractual relationship. In England, Lord Denning MR held in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) 394H–395A,

applying *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC 465 (HL(E)), that a solicitor owes a duty not only to the client who employs him, but also 'to another who he knows is relying on his skill to save him from harm'. This is the so-called 'assumption of responsibility' test. In *Kamahap Enterprises Ltd v Chu's Central Market Ltd* [1990] 64 DLR (4th) 167 the British Columbia Court of Appeal held that solicitors acting for one party to a commercial dealing could not possibly be liable to the other party where, as was conceded in that case, that other party at no time relied on the solicitors. In New Zealand, the Court of Appeal held in *Connell v Odlum* [1993] 2 NZLR 257 that a solicitor who did not perform a statutory duty imposed on him in that he failed properly to advise a woman, who was about to get married, of the consequences of a contract limiting her rights to her husband's property on divorce ─ with the consequence that the contract was not enforceable at the suit of the husband in subsequent divorce proceedings ─ owed a duty to the husband. In contrast to the Canadian decision in *Kamahap Enterprises* the court held (265 line 30), following the judgment of Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 297, that although the extent to which the plaintiff may have relied upon the defendant acting with due

care can be an important factor weighing in favour of the imposition of a duty, specific reliance is not essential to give rise to such a duty. And it is now clear from the decision of the House of Lords in *White* that in England a duty may be found to exist to a third party where the third party could not have relied upon the solicitor. In *White* the House of Lords held (by a majority of three to two) that where a solicitor accepted instructions to draw up a will and, as a result of his negligence, an intended beneficiary under the will was reasonably foreseeably deprived of a legacy, the solicitor was liable to the beneficiary for the loss of the legacy. The same conclusion was reached by the High Court of Australia in *Hill v Van Erp* [1996–1997] 188 CLR 159. The Court of Appeal in England has subsequently held in *Dean v Allin & Watts* [2001] 2 Lloyds LR 249 (CA) that a solicitor instructed by the borrowers in a lending transaction to arrange security for the loan by the lender, owed a duty to the lender to ensure that the security was effective. The basis of the decision (para [40]) was that the law should impose such a duty where to a solicitor's knowledge his client wished to confer a benefit on another party that was fundamental to a transaction between the parties.

[14] I do not propose examining the approach of foreign courts in any further detail. The exercise is useful because it provides insight into the

way in which other countries with comparable systems of law have sought to answer the difficulties that occur when it is sought to impose a duty on an attorney to the lay client on the other side. It is nevertheless the values and norms of the inhabitants of this country, particularly those enshrined in our Constitution, which must dictate the legal position in South Africa (*Van Duivenboden* para [16]). Moreover, some 20 years ago Grosskopff JA in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 505C—E referred to the fact that the development in English law of liability in tort for professional negligence was, to some extent at least, influenced by the rule of English law that, in general, an agreement is not enforceable unless there is 'valuable consideration' and pointed out 'the danger of assuming that policy considerations which may be valid in one legal system would necessarily also be applicable elsewhere'. What is needed is a South African solution to a problem which has arisen in a South African context.

[15] It must also be borne in mind that reasoning by analogy is dangerous: *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) paras [17] and [18]; and that even where cases are identical, today's decision is not necessarily a reliable precedent for tomorrow's case as the position is

susceptible to change in accordance with the barometer of society's norms and values (although always subject to the Constitution). As Millner *Negligence in Modern Law* 203 says: 'The social forces which favour stability and those which promote change interact in a profoundly complex and subtle manner to yield normative solutions in law and morals'. All of this is of course of little comfort to legal practitioners and their clients, but certainty has to be sacrificed on the altar of flexibility.

[16] Returning to the facts of this case, it can be stated quite bluntly and without qualification that the respondents owed no legal duty to the Fund to ascertain whether their client was indeed whom she purported to be either at the time when the respondents submitted the claim or when they disbursed the settlement amount. On the contrary, it was the statutory function of the Fund to investigate claims in terms of the schedule to the Act or to appoint agents who had that function. Article 2 of the schedule to the Act provided:

'The MMF shall have as its task the payment of compensation for certain loss or damage caused by the unlawful driving of certain motor vehicles within the jurisdiction of its Members.'

Article 3 provided inter alia that:

'For the purposes set out in Article 2, the powers and functions of the MMF include ─

…

(b) the *investigation* and settling of claims, as prescribed, arising from loss or damage caused by the driving of a motor vehicle where the identity of neither the owner or driver thereof can be established;

(c) the appointment of agents to administer certain claims for compensation contemplated in Articles 13 and 40 of this Agreement.' (My emphasis.)

Where an agent was appointed, Article 13 provided inter alia that:

(b) An appointed agent shall be competent ─

(i) to *investigate* or to settle on behalf of the MMF any claim … arising from the driving of a motor vehicle in the case where the identity of either the owner or driver thereof has been established …' (My emphasis.)

(The functions of the MMF were transferred to the Fund by s 2(2)(a) of the Road Accident Fund Act, 56 of 1996. Section 4(1) of that Act provides inter alia that:

'The powers and functions of the Fund shall include ─

…

(b) the *investigation* and settling, subject to this Act, of claims arising from loss or damage caused by the driving of a motor vehicle whether or not the identity of the owner or driver thereof, or the identity of both the owner and the driver thereof, has been established.' (My emphasis.))

[17] The investigation contemplated in the legislation in question includes no less the *locus standi* of the claimant, and therefore the claimant's identity, than the merits and quantum of the claim. And if the

Fund relies on attorneys on the panel of attorneys authorised to bring claims under the Act to verify the identity of claimants, as its counsel said it does, it is not entitled to hold those attorneys liable in damages even if they are negligent. In the absence of a statutory or contractual obligation to do so, policy does not require the imposition of such a duty in delict. Of course the Fund is entitled to assume that an attorney is not a party to any fraud. But the same applies to an attorney in relation to the client. Subject to what is said in para [18] below, an attorney is not obliged to treat a client with suspicion and obtain independent corroboration for the client's instructions before submitting the client's claim or before paying over the amount of a settlement, upon pain of liability in delict to the Fund if this is not done. Such a duty would be inimical to the trust fundamental to the attorney-client relationship. It could also increase the cost to the client and result in delay, with the concomitant danger of prescription.

[18] I do not wish to be understood as saying that an attorney is never obliged to make further enquiries before submitting a claim on behalf of a client to the Fund. Circumstances may arise where an attorney is actually put on his guard. An example would be where a woman manifestly under the age of twenty-five years of age wishes a claim for

loss of support to be submitted to the Fund because of the alleged wrongful killing of her husband in a motor vehicle accident, and the attorney realises that the marriage certificate she has produced reflects that the marriage took place thirty years ago. An attorney who notices a discrepancy like that would be obliged to make further inquiries because his failure to do so would amount to fraud. As Greenberg JA said in *R v Myers* 1948 (1) SA 375 (A) at 382, quoting Halsbury's Laws of England, a belief is not honest (and is therefore fraudulent) which 'though in fact entertained by the representor may have been itself the outcome of fraudulent diligence in ignorance ─ that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe'. Of course this would be difficult to prove. Fraud usually is. But the test must be subjective because it is the function of the Fund to investigate claims and a 'reasonable man' objective test would both tend to shift the Fund's statutory investigative function to the attorney and also undermine the attorney-client relationship which, as a matter of policy, is regarded as so intimate that in the law of evidence it is even protected by a special

privilege of confidentiality.

[19] Even had the respondents owed the Fund a legal duty, there was no negligence. The test in this regard is well established and set out in *Kruger v Coetzee* 1966 (2) SA 428 (A) 430F—G:

'For the purposes of liability *culpa* arises if —

(a) a *diligens paterfamilias* in the position of the defendant —

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.'

The facts show that the client furnished the respondents with a temporary identity document in the name of the widow which, on the probabilities, had the client's photograph on it and which was a forgery produced with the assistance of an official in the Department of Home Affairs. The client had deposed to an affidavit stating that she was the widow of the deceased and the mother of his children. The client was furthermore accompanied on her visits to the first respondent by the deceased's brother, who himself identified her as his late brother's widow. The fact that the deceased's brother gave instructions regarding the claim gave no grounds for suspicion, particularly as, to the knowledge of the first respondent, customary law would require him to

take care of his brother's widow. I find nothing in the client's instructions as to how the money was to be disbursed (in cash and partly to her 'brother-in-law'), and her explanation as to why she wanted this done, that should have alerted the first respondent to the fraud. So far as he was concerned, it was her money to do with as she pleased. In all the circumstances, had the respondents owed a legal duty to the Fund, and even assuming that requirements (a)(i) and (ii) of the test in *Kruger* were satisfied, the argument that the respondents were negligent because they did not take reasonable steps to verify the identity of their client, is without foundation.

[20] The attack advanced in the heads of argument on behalf of the Fund against the appropriateness of that part of the order made by the court below which directed the Fund to pay the costs of the third party proceedings, was not persisted in. The parties agreed that liability for those costs, which was reserved by an earlier order of court for decision by the court below, should follow the result of the appeal. The costs of the application for leave to appeal were made costs in the appeal by the court which granted leave to appeal.

[21] The appeal is dismissed with costs.

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T D CLOETE
JUDGE OF APPEAL

Concur: Marais JA
Zulman JA
Cameron JA
Southwood AJA