THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1067/2022

In the matter between:

DANNY JOSEPH SIBIYA	**FIRST APPELLANT**
DU TOIT-SMUTS ATTORNEYS	**SECOND APPELLANT**
REUBEN JADO KRIGE	**THIRD APPELLANT**

and

ROAD ACCIDENT FUND	**RESPONDENT**

Neutral citation: *Danny Joseph Sibiya and Others v Road Accident Fund* (1067/2022) [2023] ZASCA 171 (05 December 2023)

Coram: MBATHA, CARELSE and HUGHES JJA and KOEN and CHETTY AJJA

Heard: 06 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 05 December 2023

Summary: Practice and procedure – Contingency Fees Act 66 of 1997 – whether the high court ruling met the benchmark of fairness, rationality and reasonableness – whether the high court acted in a procedurally fair manner.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Legodi JP sitting as a court of first instance):

In the result the following order is granted:

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following:

'The referral by the taxing master in terms of rule 70(5A)*(d)*(ii) is dismissed.'

JUDGMENT

Mbatha JA (Carelse and Hughes JJA and Koen and Chetty AJJA concurring):

[1] This is an appeal against the judgment and order of the Mpumalanga Division of the High Court, Mbombela (the high court), per Legodi JP, granted in chambers on 2 June 2022 against two plaintiffs, one of whom is the first appellant, Mr Danny Joseph Sibiya (Mr Sibiya). Mr Sibiya sought leave to appeal against the judgment and order of the high court.[1] The second appellant, Du Toit-Smuts Attorneys (D-S Attorneys) and the third appellant, Reuben Jado Krige (Mr Krige), were granted leave to intervene and join in the proceedings. They also sought leave to appeal against the judgment of the court *a quo*. The applications for leave to appeal were consolidated and heard on 7 July 2022. On20 July 2022 the applications for leave to appeal by Mr Sibiya, D-S Attorneys and Mr Krige were dismissed with no order as to costs.

[1] The judgment of the court a quo was in respect of two plaintiffs. D Sibiya and A E Chiaw. The high court consolidated both matters as they involved what Legodi JP termed "contingency fee agreements which in their form and substance, are both null and void for non-compliance with the provisions of the Act".

[2] Dissatisfied with the outcome of the application for leave to appeal from the high court, Mr Sibiya, D-S Attorneys and Mr Krige petitioned this Court for leave to appeal against the judgment and order of the high court. On 28 September 2022, they were granted leave to appeal to this Court. The Road Accident Fund (RAF), cited as the respondent, does not oppose this appeal. It abides by the decision of this Court.

[3] The common cause facts are that on 4 March 2014, Mr Sibiya, appointed D-S Attorneys to lodge a claim against the RAF for damages arising from a motor vehicle accident which occurred on 16 February 2014. He signed an attorney and client fee agreement with D-S Attorneys for their services. On 8 October 2021 the RAF conceded the merits of Mr Sibiya's claim and tendered payment of his costs on a party and party scale. The party and party bill of costs was subsequently set down for taxation on 3 February 2022. As early as 24 January 2022, Mr Krige had already filed an affidavit with the taxing master to the effect that no contingency fee agreement existed between Mr Sibiya and D-S Attorneys.

[4] On the date of the taxation, the taxing master adjourned the proceedings and furnished Mr Krige with a letter of even date. The letter acknowledged that Mr Krige had attached an affidavit to the bill of costs to the effect that no contingency fee agreement existed between D-S Attorneys and Mr Sibiya. In addition, the taxing master in paragraph 5 of the letter posed the following questions to D-S Attorneys:

'5. However as a follow-up on our conversation, I have the following questions to ask, as a follow-up to the issue of "no contingency".

a) My question was whether the client paid cash or not?

b) When was the fee agreed upon?

c) When was such a fee paid in total?

d) What is the amount of the fee agreed upon?

e) If no fee was paid or was paid in part, when was such a fee or remaining part thereof supposed to be paid?

f) If no fee was paid, what is the basis upon which it is alleged that no contingency fee agreement was concluded?'

It was conveyed to Mr Krige that the information required by the taxing master was for the purposes of approaching one of the judges in chambers in terms of rule 70(5A)*(d)*(ii) of the Uniform Rules of Court (the Rules) for directions regarding bringing the taxation of the bill of costs to finality. Mr Krige was directed to furnish his response by way of an affidavit to be filed by no later than 10 February 2022.

[5] By way of a letter dated 8 February 2022, Mr Krige furnished his response in writing to the taxing master. On the very same day, it was communicated to Mr Krige that the matter had been referred to the Judge President for directions in terms of rule 70(5A)*(d)*(ii) of the Rules. It was pointed out to Mr Krige that he should respond by way of an affidavit to be filed by no later than 11 March 2022, as previously requested by the taxing master. He was specifically requested to respond to the questions posed in paragraph 5 of the taxing master's letter quoted above. On 16 March 2022 Mr Krige submitted his affidavit as directed by the Judge President.

[6] In summary, Mr Krige's response was that Mr Sibiya did not pay cash for their services as the matter had not yet been finalised, save for the merits which had been settled; that Mr Sibiya would only be required to settle their fees once the matter had been finalised in *toto*; that no fees had been agreed upon hence the taxation was required; that the costs to be paid by the RAF after taxation of the bill of costs would be taken into account once the matter had been finalised; that no fees had been paid by Mr Sibiya and that he would be debited for professional services rendered as per attorney and client fee in terms of the agreement signed by him once the issue of quantum had been dealt with. As regards the reference

to rule 70(5A)*(d)*(ii) Mr Krige confirmed that he was 'unaware of any misbehaviour'. Mr Krige did not receive any further communication from the Judge President.

[7] On 2 June 2022, the high court delivered an extensive joint judgment under case number 557/2016, in *Danny J Sibiya v RAF* and *Anita Ernesto Chiau v The RAF*, case number 1150/20.[2] The high court in respect of Mr Sibiya's matter granted the following orders:

'84.6 The fee agreement concluded between the plaintiff and his attorney of record is hereby reviewed and set aside due to its illegality as set out in this judgment and the plaintiff is not obliged to pay any fee or costs to his or her attorneys of record.

84.7 Settlement on the matter on merits between the plaintiff and defendant is hereby noted and taxation thereof to be stayed over until finalisation of the case in its entirety.

84.8 The Legal Practice Council to consider whether the conduct of attorney Krige in concluding the fee agreement as he did which has now been found to be illegal, constituted unprofessional conduct and if so to take such steps as it might deem appropriate.

84.9 The Legal Practice Council is hereby directed to advise the plaintiff to consider instructing another attorney to proceed with his matter to its finality and the plaintiff should also be advised that he is not obliged to pay anything to the attorneys of record due to the illegality of the fee agreement.

84.10 The plaintiff's attorneys are hereby directed to bring this Judgment to the attention of the plaintiff and explain the contents thereof to the plaintiff and confirm in an affidavit to be filed by not later than Friday 10 June 2022 that the order in this paragraph has been complied with.'

[8] Before us, the three appellants challenge the aforementioned orders on procedural and substantive grounds: first, that the court *a quo* formulated a judgment in chambers in the absence of the appellants and without affording them an opportunity to be heard in regard to the specific relief granted; secondly, that the orders had the effect of depriving D-S Attorneys and Mr Krige of their earned fee for services rendered to Mr Sibiya; third, that the court was wrong in finding

[2] *Sibiya v Road Accident Fund: In the matter of Chiau v Road Accident Fund* [2022] ZAMPMBHC 40.

that the fee agreement with Mr Sibiya was illegal and therefore unenforceable; and lastly, that the court findings were premised on a misdirection of fact and law.

[9] The referral by the taxing master to a judge in chambers was in terms of rule 70(5A)*(d)*(ii) of the Rules. The rule reads as follows:

'Where a party or his or her attorney or both misbehave at a taxation, the taxing master may —

(ii) adjourn the taxation and refer it to a judge in chambers for directions with regard to the finalisation of the taxation'.

It is trite that a statutory provision needs to be interpreted purposively, consideration must be given to language used in the light of the ordinary rules of grammar and syntax and contextually.[3]

[10] It is clear from the language of the provision that rule 70(5A)*(d)*(ii) is not a referral for consideration of a contingency fee, or attorney and client fee agreements. Its purpose is to deal with misbehaviour of a party and his or her legal representative, or both, before a taxing master and nothing else. It is not a mechanism for bringing the fee agreement before a court, for determination of whether it is a contingency fee agreement or not. There was furthermore no evidence of any misbehaviour. The approach adopted by the Judge President's office was procedurally flawed and irregular.

[11] A fundamental rule of our law is that a wrong process vitiates the proceedings. Astoundingly, the high court proceeded with the irregular process of using rule 70(5A)*(d)*(ii) even though Mr Krige had pointed this out in his affidavit. The high court consciously disregarded what Mr Krige had pointed out. A proper consideration of all the documents indicates that nothing required the

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 25.

intervention of the Judge President at that stage, as the bill of costs to be taxed was on a party and party scale between the RAF and Mr Sibiya, following a capitulation on the merits of Mr Sibiya's claim against the RAF. I point out that the approach adopted by the courts should only advance the interest of justice. The doctrine of legality demands that no one, not even a court of law, should exercise powers they do not have, this is sometimes referred to as judicial restraint. Judge Richard S Arnold quoted with approval in *Estate Late Stransham-Ford and Others* 2017 (3) BCLR 364 (SCA) para 24 stated that:

'[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do.'[4]

The consequences of the breach of such doctrine of law are that a court of law would find itself making irreversible orders which will have a detrimental impact on the litigants as well as their legal representatives.

[12] The high court did not inform nor invite the parties, including the RAF, to make representations regarding the fee agreement and its legality. The rules of court require the parties to file their affidavits and heads of argument before the matter serves before a Judge for a hearing. The rules serve to regulate the conduct of proceedings in civil and criminal matters and govern how a case may be commenced, the service of processes and setting down of matters for hearing in an open court. In that regard, no court may *mero motu* in chambers deal with matters that are not properly placed before it.[5] The handling of the matter by the court in chambers was irregular, a hearing by ambush and a breach of one of the fundamental principles of our law, the right to be heard.

[4] *Minister of Justice and Correctional Services and Others v Estate Late Stransham-Ford and Others* 2017 (3) BCLR 364 (SCA) para 24.
[5] *Fisher and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) para 13-14.

[13] Although the Constitutional Court, Supreme Court of Appeal and the High Courts have in terms of Section 173 of the Constitution of the Republic of South Africa, an inherent power to protect and regulate their own processes, a hearing needs to be in an open court. Kriegler J in *Botha v Minister van Wet en Orde en Andere,*[6] pronouncing on undesirable possible results of secret or non-public court proceedings, quoted the following words of Justice Brennan in the United States Supreme Court:

'Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.'[7]

The right of access to courts is generally guaranteed to safeguard equal protection of the law and to ensure that no person will be deprived of due process of the law. The failure to hear a litigant impacts on s 34 of the Constitution which provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

[14] Equally so, the *audi alteram partem* rule is a fundamental principle of our law enshrined in the Constitution. Every litigant is entitled to be afforded a hearing before a court of law. The high court had a duty to act procedurally fair to the three appellants as its decision had an adverse impact on their rights. By inviting the appellants to participate in the proceedings would have contributed to the accuracy of the decision of the court. I do not need to traverse the substantive challenges made by the appellants as the issues which I have dealt with are dispositive of the appeal.

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[6] *Botha v Minister Van Wet en Orde en Andere* [1990] 4 All SA 461 (W); 1990 (3) SA (937) (W).
[7] Ibid at 464.

[15] A further reason why the *audi alteram partem* was imperative is that the orders which followed cast aspersions on Mr Krige's professional competence and ethical behaviour, and resulted in a referral of the matter to the professional regulatory authority without him being afforded the opportunity to defend the findings. For these reasons alone the appeal should also be upheld. In addition, the Judge President failed to have sight of the fee agreement. There was no attempt to engage with its contents, although inferences were drawn from it albeit not a document before the court. These in themselves represent an egregious breach of fundamental rules of judicial etiquette.

[16] In the result the appeal must succeed. A procedural defect is an absolute bar to the court's jurisdiction. When the court lacks jurisdiction the appeal must be upheld. I therefore find that the orders were erroneously granted in light of the procedural irregularities aforesaid.

[17] This Court raised the issue whether the appellants were entitled to costs and who should bear the cost of appeal, as the RAF was not a party to the proceedings. Though the high court went off on a tangent and decided the matter without the benefit of the views of the parties, it cannot be mulcted with costs. Counsel for the appellants proposed that costs should be costs in the cause. I do not agree with that proposition as it means that eventually the cost will have to be borne by RAF and the RAF cannot be burdened with costs in a litigation relating to an event to which it was not a party. Counsel for the appellants offered to waive his fees in the interest of justice, which is commendable. It is unfortunate that it has been a costly exercise for the appellants. Having regard to the aforementioned and for all the reasons given, it follows that the appeal must succeed with no order as to costs.

[18] In the result, the following order is granted:

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following: ‘The referral by the taxing master in terms of rule 70(5A)*(d)*(ii) is dismissed.’

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Y T MBATHA

JUDGE OF APPEAL

Appearances

For the appellants	B P Geach SC
Instructed by:	Du Toit-Smuts Attorneys, Johannesburg
	Pieter Skein Attorneys, Bloemfontein
For the respondent:	C Bernman
Instructed by:	Road Accident Fund, Pretoria.
	State attorney, Mpumalanga, Mbombela (on a noting or watching brief)