THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal against the decision of the Mpumalanga Division of the High Court, Mbombela (the high court), with no order as to costs and replaced it with the following order: 'The referral by the taxing master in terms of rule 70(5A)*(d)*(ii) has been dismissed'

The common cause facts were that on 4 March 2014, Mr Sibiya, appointed D-S Attorneys to lodge a claim against the RAF for damages which arouse 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. 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 the 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 posed several follow-up questions to D-S Attorneys relating to issues of contingency fees. It was further 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.

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. 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 and ordered that the fee agreement entered between D-S Attorneys and Mr Sibiya be reviewed and set aside due to its illegality and that Mr Sibiya was not obliged to pay any fee or costs to his or her attorneys of record; that taxation thereof to be stayed over until finalisation of the case in its entirety; that the Legal Practice Council (LPC) to consider whether the conduct of Mr 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; that the LPC 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 was not obliged to pay anything to the attorneys of record due to the illegality of the fee agreement.

The appellants applied for leave to appeal the high court's judgment and order, however, such application was dismissed. Dissatisfied with the outcome of the application for leave to appeal from the high court, they 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 RAF, cited as the respondent, did not oppose this appeal. It abided by the decision of this Court.

Before this Court, the three appellants challenged 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 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.

The SCA held that it was clear from the language of the provision that rule 70(5A)*(d)*(ii) was not a referral for consideration of a contingency fee, or attorney and client fee agreements. Its purpose was to deal with misbehaviour of a party and his or her legal representative, or both, before a taxing master and nothing else. It was not, according to the SCA, a mechanism for bringing the fee agreement before a court, for determination of whether it was 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. The SCA further held that the high court erred in not informing nor inviting the parties, including the RAF, to make representations regarding the fee agreement and its legality. The rules of court required the parties to file their affidavits and heads of argument before the matter was served before a Judge for a hearing. The rules serves 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 could *mero motu* in chambers deal with matters that were not properly placed before it. 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. The SCA pointed out that the *audi alteram partem* rule was a fundamental principle of our law enshrined in the Constitution. Every litigant was entitled to be afforded a hearing before a court of law. It further held that 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. In addition, according to the SCA, 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 represented an egregious breach of fundamental rules of judicial etiquette. In the result the appeal must succeed.

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