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JUDICIAL RELIANCE ON DOCUMENTS NOT ESTABLISHED INTO EVIDENCE: DISPENSING JUSTICE OR INJUDICIOUS OVERREACH?

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Documents make their way to the court file via numerous avenues. Courts sometimes rely on the contents of such documents, which are not established into evidence, to draw inferences and adjudicate disputes. The main reason for this practice is to buttress fraud committed against parties such as state organs because of their lackadaisical approach to litigation, knowing that the taxpayer foots the bill. Some courts go so far as to suggest that the court should employ an inquisitorial approach in matters involving state organs or even take a partisan approach. Noble as the court's intentions hopefully may be, several policy decisions point to the undesirability of this practice. This note considers, first, the general rule that a document in the court file is inadmissible hearsay evidence until it is established into evidence; secondly, the reasons why a court would have regard to such non-evidence; thirdly, the policy reasons justifying the general rule; and, fourthly, the recent misplaced suggestion that documents may more readily be admitted into evidence under the common-law exception to the rule against hearsay evidence or under s 34(2) of the Civil Proceedings Evidence Act. Recommendations to remedy this objectionable practice conclude the note.

Evidence – admissibility – documents not established into evidence – judicial overreach

INTRODUCTION

In terms of the adversarial or accusatorial justice system, a litigant is entitled to the discovery of documents in the possession or under the control of his or her opponent (Rule 35 of the Uniform Rules of Court). The discovery of documents will disclose the documents available to the parties, which documents may potentially be receivable in evidence (*Durbach v Fairway Hotel* 1949 (3) SA 1081 (SR) at 1083). The content of the documents is not evidence without more (*Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C) at 552; *Selero v Chauvier* 1982 (2) SA 208 (T) at 216). Documents make their way to the court file through discovery but also through the exchange of notices unrelated to discovery, such as notices contemplated by Uniform Rules 35(12), 35(14), 35(9) and 36(10).

A selected case review below shows that courts increasingly 'peek' into the court file to peruse such documents, and that courts subsequently rely on these documents to draw inferences and/or to adjudicate a case.

In the case of *Chauke v RAF* [2023] ZAFSHC 214, a full bench (sitting as an appeal court) correctly criticised the court a quo in *Chauke v RAF* [2022] ZAFSHC 40 for relying on documents in the court file that had not been admitted into evidence. The appeal court curiously alluded to two alternative methods that may be employed to have the documents

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admitted into evidence. The first suggestion is premised on the common-law exception to the rule against receiving hearsay evidence (para 22), whilst the second is premised on s 34(2) of the Civil Proceedings Evidence Act 25 of 1965 (para 23). These propositions deserve closer scrutiny.

THE REASON FOR PEEKING INTO THE COURT FILE

Organs of state are often described as 'delinquent' or 'less diligent' litigators (*K obo M v RAF* 2023 (3) SA 125 (GP) para 1). The Road Accident Fund ('RAF') is often not legally represented (*Mzayiya v RAF* [2021] 1 All SA 517 (ECL) para 104), and either does not participate in litigation at all or does not effectively do so (*Fourie v RAF* 2014 (2) SA 88 (GNP) para 69; *MEC for Roads and Public Works, Eastern Cape v Intertrade Two* 2006 (5) SA 1 (SCA) paras 20–1). Organs of state access public funds to litigate and to pay damages claims to judgment creditors falling within the province of the Public Finance Management Act 1 of 1991. In an ironic twist, the deep-pocketed, disinterested, lackadaisical and incompetent litigation strategies on the part of some organs of state place them at a disadvantage, which brings about an inequality of arms, where litigants suing organs of state take advantage of the prevailing circumstances and invariably get the upper hand. This situation is exacerbated by state organs being susceptible to fraud and malfeasance in the litigation milieu (*Fourie Fismer v RAF* [2020] 3 All SA 460 (GP) para 81; *Hotel Slots v Premier of North West* [1999] JOL 5120 (B) at 16).

In a bid to compensate for this imbalance, courts tend to bend over backwards to aid the organs of the state, as was evident in *Motswai v RAF* 2013 (3) SA 8 (GSJ) (now overturned on appeal in *Motswai v RAF* 2014 (6) SA 360 (SCA)). In *Mzayiya v RAF* (supra) para 106, Kroon AJ held that the court might have to adopt a more inquisitorial approach in matters involving organs of state such as the RAF because the court 'cannot sit back supine whilst the RAF is finding its feet' (ibid para 14). The court went so far as to suggest that the courts must heed and be cognisant of the state of the RAF and must insist on additional measures and safeguards (ibid para 107). Kganyago J, in *Vutlhari v RAF* [2022] ZALMPPHC 31, perused the court file before the hearing of the matter and identified discrepancies between what was pleaded, on the one hand, and documents in the court file, such as the accident report (para 3) and hospital records (para 2), on the other hand. The court, relying on *PM obo TM v RAF* 2019 (5) SA 407 (SCA) paras 34–5 — a case not on point and instead dealing with the court's imprimatur of inter partes settlements, as opposed to active litigation — held that the RAF had terminated the services of its panel attorney, thereby placing a burden on the court to ensure 'everything was in accordance with justice' as 'these matters involve public funds' (para 6).

In both the court a quo judgments in *Taylor* 2021 (2) SA 618 (GJ) and *Motswai* (supra), the court handed down judgments that were informed by

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the protection of state resources. The court irregularly resorted to reliance on pleadings and documents not admitted into evidence (*Motswai* (SCA) (supra) para 26; *RAF v Taylor* 2023 (5) SA 147 (SCA) paras 24, 31 and 36). In relying on non-evidence ultimately to make serious and adverse findings against professionals, these judges resorted to what the SCA has called 'injudicious overreach' (*RAF v Taylor* (SCA) (supra) para 30; also see F H H Kehrhahn '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' (2021) 54 *De Jure* 265). They inadvertently disregarded the rights of injured victims (including rights enshrined in the Bill of Rights), motivated by the misdirected need to fend off legal practitioners described as 'predators (carnivores)' (*Motswai* (a quo) (supra) para 2) and 'malfeasance' (*Taylor* (a quo) (supra) paras 1, 2, 10, 14–15 and 17–18).

Fisher J has held in this context that courts must work tirelessly to stem the tide of fraud and corruption (*Taylor* (a quo) paras 15 and 17). In her interview before the Judicial Service Commission, applying for a position on the Competition Appeal Court (available at *https://www.judgesmatter.co.za/october-2016-interviews/jsc-candidates/advocate-fisher-sc/*, accessed on 28 January 2024), she said the following when asked about her now overturned judgment in *Taylor*:

> '[J]udges are now in a predicament where they have to fight the corner of the Defendant because there is no defence counsel. So, when a judge has difficulty with evidence, there is nobody to put forward that part of the case, and literally millions and millions are being irregularly spent, and the RAF is bankrupted.'

Noble as the court a quo's intentions may have been in both *Motswai* and *Taylor*, both decisions had to go to the SCA to correct the errors, which no doubt adversely caused delay and further costs for the injured victims (see *Motswai* (SCA) (supra); *Taylor* (SCA) (supra)). Justice delayed is justice denied (*De Waal Alberts v Louis Nel* 2019 JDR 0671 (SCA) para 15 with reference to *Koagile v PRASA* 2019 JDR 0880 (GJ); *Dichabe obo GN v RAF* [2020] ZAGPPHC 250).

Despite the SCA having warned against making findings without evidence, this practice is ongoing and, once again, raised its ugly head in *Chauke v RAF* (a quo) (supra).

THE STATUS OF DOCUMENTS IN THE COURT FILE

When a court is asked to make a settlement agreement an order of court, and the documents before a judge raise a concern regarding the legitimacy of a claim, the court may investigate and, if needs be, call for further evidence, but may not draw inferences from the documents alone (*Theodosiou v Schindlers Attorneys* 2022 (4) SA 617 (GJ) para 52; *Motswai* (SCA) (supra) para 46; *PM obo TM* (supra), minority judgment, paras 58–60).

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In such a case, the contents of the accident report would be derived from a person with a vested interest in the matter, and the admission of the accident report would, therefore, be barred or disqualified under s 34(3) of the Act.

Typically, an accident report is compiled by a police officer, sometimes simply from observation of the accident scene and not because of being informed by someone with actual knowledge of the accident. If the police officer completed the accident report from personal observations, the police officer would have no personal knowledge of the actual accident, except that an accident factually occurred, disqualifying the report's admission under the Act.

HOW TO REMEDY THE IRREGULAR RELIANCE ON DOCUMENTS ADMITTED INTO EVIDENCE

Judges take an oath of office (Schedule 2, s 6(1) of the Constitution), swearing or affirming to uphold the Constitution, to protect human rights and to administer justice 'to all persons alike', without favour or prejudice. Judges who rely on non-evidence in adjudicating disputes make themselves guilty of actions that breach the constitutional rights of litigants, who have rights to equality (s 9), a fair hearing (s 34) and a fair trial (s 35(3)). The SCA in *Taylor* (supra) described the judicial reliance on documents and pleadings not admitted into evidence as an 'injudicious overreach' to be 'strongly deprecated' (para 30). The SCA has repeatedly rebuked judges a quo for this judicial conduct, but to no avail. Given the adverse consequences to litigants (often lay, destitute and disenfranchised personal-injury victims) and the stark policy consideration that points to refraining from this conduct, the South African Judicial Education Institute (as provided for in the South African Judicial Education Institute Act 14 of 2008) should specifically train judges on the status of documents in the court files. The Chief Justice may also address this conduct in written protocols or directives to guide judges and magistrates in terms of the Norms and Standards for the Performance of Judicial Functions (op cit).

Fisher J publicly admitted that she fights the corner of a given party, the RAF. How can there be fairness when a judge adopts both the role of counsel (fighting the corner of the state organ) and judge? The blindfold of Lady Justice, which supposedly represents unbiased justice, then slips off, and the scale she carries, which represents impartiality, is tipped skew. The Judicial Conduct Committee, in terms of the Judicial Services Commission Amendment Act 20 of 2008, in a complaint lodged against Fisher J, held that, 'taken on the face value', Fisher J 'has committed misconduct in the form of a breach of the Code, which although not rising to the level of "gross misconduct" does warrant further probing' (Judicial Conduct Committee, *De Broglio Inc v Judge D Fisher*, ref no JSC/894/21).

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Should all else fail, strong action could be employed against delinquent judges in a bid to stop their irregular reliance on non-evidence.

CONCLUSION

This note has considered the status of documents in the court file not admitted into evidence. It proposes reasons why a court may wish to have regard to documents not admitted into evidence and the policy considerations justifying refraining from such a practice. In addition, the note considers recent propositions by the full court in *Chauke* (supra) that documents in the court file may be admitted as a common-law exception against receiving hearsay evidence and in terms of s 34(2) of the Civil Proceedings Evidence Act.

The Constitution mandates judicial independence (s 165). The tendency of some judges to protect state organs and to fight their corner by manipulating or ignoring clear rules of evidence should be addressed. C H Powell 'Judicial independence and the office of the Chief Justice' (2019) 9 *Constitutional Court Review* 497 at 519 says it best:

> 'Judicial independence is more than the relationship between the judiciary and outside governmental bodies or the general public. It starts, and is maintained by, the rule of law processes within the judicial institution itself. However, its primary virtue is to protect the society which the judiciary serves … .'

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