IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 33002/12

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

02 / 03 / 2016
DATE

SIGNATURE

2/3/2016

In the matter between:

SIBANYONI: OKIE MESHACK — PLAINTIFF

and

DU TOIT-SMUTS & MATHEWS PHOSA ATTORNEYS — 1st DEFENDANT

MR. JOSHUA SCHEEPERS — 2nd DEFENDANT

DR NAKEDI MATHEWS PHOSA — 3rd DEFENDANT

LEANDA CILLIERS	4th DEFENDANT
S.W. RHEEDER	5th DEFENDANT
JOHAN OOSTHUIZEN	6th DEFENDANT
PIETER GEORGE SLABBER VAN ZYL	7th DEFENDANT
KHADIJA DOCKRAT	8th DEFENDANT

JUDGMENT

MAVUNDLA, J.

[1] The plaintiff was a passenger in one of the two motor vehicles which collided with each other on 19 February 2008 along N4 Highway in Ngodwana, Mpumalanga Province. The plaintiff instructed the respondents to claim against the Road Accident Fund for the damages he suffered as the result of the fractured left acetabulum and fractured left femur, *inter alia*, injuries he sustained in the said collision. His claim against the RAF was subsequently settled by the defendant for an amount of R103 500. 00 during November 2011. The defendant accounted to the plaintiff and paid him an amount of R80 000. 00 in November 2011. It is not in dispute that the plaintiff's claim was under-settled. Consequently the plaintiff claimed from the defendants jointly and severally, the one paying the other to be absolved, alleged damages he suffered in the amount of R1 411 130. 14, as the result of breach of mandate and negligence on the part of the defendants.

[2] At the commencement of the hearing of the matter, by agreement between the parties this court ordered in terms of rule 33(4) separation of the issues in respect to breach of mandate in paragraph 20.1 to 20.11 of the particulars of claim and paragraph 8 of the defendant's

plea from the balance of the issues, the latter remaining postponed *sine die* with costs attendant thereto. The Court further ruled that the defendant had the duty to begin.

[3] The defendants called two witnesses, namely the 2nd defendant, the attorney in the first defendant who was handling the plaintiff's claim and Mr David Nkosi employed as a clerk and interpreter by the first defendant. The plaintiff closed his case without calling any witness.

[4] In the unreported judgment of Fourie, Ursha Yvonne and Ronald Bobroff & Partners Inc. case number 12/ 3663 (SHCJGB) a matter which involved an under settled claim against the attorneys, who professed to be experts in third party claims sued for negligence, the following was cited by the Court:

"The relevant Legal Principles

15. The relevant principles relating to the liability of an attorney for negligence are summarised by Harms in Amler's Precedents of Pleadings, Seventh Edition at page 59 as follows:-

"The liability of an attorney towards a client for damages resulting from that attorney's negligence is based on a breach of the contract between the parties. It is in terms of the contract that the attorneys will exercise the skill, adequate knowledge and diligence expected of an average attorney. An attorney may be held liable for negligence even if he or she committed an error of skill, knowledge and diligence.

In order to succeed the client must allege and prove

(a) The mandate;
(b) Breach of mandate;
(c) Negligence in the sense as described above;
(d) Damages, which may require proof of the likelihood of success in the previous proceedings;
(e) That the damages were within the contemplation of the parties when the contract was concluded."

[5] The relationship between an attorney and client is based on a contract of mandate; *vide Mort NO v Chiat.*[1] To succeed with an action of damages against an attorney there must have been a want of skill or care such as to amount to a breach of contract. *Honey and Blanckenberg v Law*[2] where it was held that:

"5.1 Such liability arises out of contract and the exact duty towards the client depends on what the attorney is employed to do. In performance of his duty or mandate an attorney holds him out to his clients as possessing adequate skill, knowledge and learning for the purpose of conducting all business that he undertakes."

[6] In the unreported judgment of Fourie v Ronald Bobroff and Partners Inc. Gauteng Local Division, Case 12/3663 Gauteng Local division, Johannesburg the court quotes with approval from Midgley that:

6.1. Where a Plaintiff alleges that he suffered a loss due to a settlement that was too low, he needs to prove that the amount recovered is less than the amount that would have been determined by a properly negotiated settlement or which a Court would've ordered;

6.2. Every lawyer has a duty to establish the facts and evidence to assist his client. If a settlement is too low as a result of his failure to investigate properly, he will be held liable. In my view, once it is conceded that there was an under settlement, the *onus* on the part of the plaintiff is invariably discharged. The plaintiff need not prove anything more.

[7] It was held in *Phillips v Fieldstone Africa (PTY) LTD and Another*[3] that a relationship arising out of a fiduciary duty has the following characteristics:

7.1. Scope for exercise of some discretion or power;

7.2. Power or discretion may be exercised unilaterally so as to effect a beneficiary's legal or principal interests;

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[1] 2001 (1) SA 464 (C).
[2] 1966 (2) SA 43 (SR) at 46/47 .
[3] 2004 (3) SA 465 (SCA).

7.3. Its existence, and its nature and extent, are questions of fact that have to be deduced from a thorough consideration of the substance of the relationship and any relevant circumstances affecting the operation of that relationship. While agency was not a necessary element of a fiduciary relationship, its existence almost always provided an indication of such a relationship. (Paragraph [27] of Heher JA's judgment at 477H - I.).

[8] The only defence open to a fiduciary who had breached his trust is the free consent of the principal where there was full disclosure. (Paragraph [31] of Heher JA's judgement at 479D – 480C/D), where Heher held that the following approach commended itself as a practical way of dealing with cases of the present nature:

Once it was established that there was such a relationship, that relationship had to be examined to see what duties were thereby imposed on the agent. Having defined the scope of those duties, it had to be determined whether he had committed some breach thereof by placing himself within the scope and ambit of those duties in a position where his duty and interest possibly conflicted.

[9] In *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Maatskappy v Lebos* and Another[4] it was held that: There is a duty of care owed by an attorney, conducting litigation on behalf of a client, to the Court and a duty of care owed towards his opponent, which duty of care does not readily admits of clear definition. This duty is not a servile one but must at all times, in my view, be an informed one. The Court has the prerogative, depending on the circumstances of a case, to make a value judgment to decide the issue relating to the duty and acquittal thereof.

[10] The relationship between an attorney and client is one based on a contract. The contract, by virtue of his profession and undertaking to his client professes to be vested with adequate legal knowledge and skill to advance the interest of client, imposes a fiduciary duty on the attorney on the attorney to act with professional skill and diligence towards his client. *Vide*

[4] 1985 (4) SA 341 (T) at 347E-348A..

Lekeur v Santam Insurance Co Ltd;[5] *RAF v Shabangu and Another*[6]. In my view, making a value judgment, an attorney has a professional duty towards his client to ensure that he does not under settle his client's claim. *Vide Boe Bank v Ries.*[7]

[11] *In casu* it is not in dispute that the claim was under settled. The defence proffered by the defendants was that the plaintiff instructed them to settle and accepted the offer put on the table by the Road Accident Fund. Towards buttressing this defence, the defendants called two witnesses who testified on behalf of the defendants.

In my view, the issue to be decided is whether the defendant can be held liable for having under settled the claim. The defence of the defendants was that the plaintiff instructed them to accept the offer. To buttress this defence, only two witnesses testified on behalf of the defendants.

[12] The defence raised must be measured against the evidence of the attorney who was seized with the matter. Mr Scheepers, the attorney who was handling the claim on behalf of the plaintiff, conceded under cross examination that he did not properly quantify the claim of the plaintiff against the RAF. He conceded that he never referred client to a specialist in order to be able to properly quantify his claim. He conceded that he was duty bound to protect the interest of his client after having properly investigated the claim and advised his client accordingly. He conceded that the plaintiff was never advised of the monetary value of his claim. As pointed out herein above in paragraph [6] *(supra)* failure to properly collect sufficient evidence to advance the plaintiff's claim against the RAF *in casu*, will result in the attorney being held liable.

[13] In my view, an attorney who leaves his professional duties to an ordinary clerk- cum- driver, to take instructions and advice client, cannot profess to have acquitted his professional duties to his client. *In casu*, Scheepers left it to Mr David Nkosi, his clerk-cum -driver to explain to the plaintiff the offer that was on the table. According to Mr Nkosi, he informed plaintiff that there was on the table an offer of R100 000. 00 and he would get only an

[5] 1969(3) SA 1 (CPD) at 6H-7A.
[6] 2004 (2) ALL SA 356 (SCA) at at 361 para [11] –[12].
[7] 2002 (2) SA 39 (SCA) at 46 I-47a.

amount of R80 000. 00. Nkosi said that he informed plaintiff that he may go to a medico legal experts and by so doing his claim would be increased. He did not inform him how long that might take and how much more his claim would be. He said that the plaintiff instructed and insisted that the offer should be accepted because he wanted to buy a motor vehicle. In my view, there is not much weight this Court need to place on the evidence of this witness because he contradicted himself in various respects. The record will bear testimony to this fact. Besides, this Court was not impressed by this witness.

[14] In my view, Scheepers owed a legal duty and a moral duty to ensure that he executes his client's mandate in the absolute professional manner to ensure that he claims and or settles in the most favourable amount for the benefit of the plaintiff. *In casu*, the defendants contend that they settled the claim as the result of the insistence of the plaintiff. I do not accept this explanation. The accident occurred on the 19 February 2008.The matter was settled in November 2011. For almost three years Scheepers had done nothing to properly quantify the plaintiff's claim. The Road Accident Fund placed on the table an offer premised on the nature of the evidence placed before it by Scheepers. The probabilities are that had medico legal experts report been placed before the Fund, certainly a better offer would have been placed on the table. Besides, the plaintiff was not placed in a position to make an informed decision about the value of his claim. In my view, Scheepers was negligent in failing to properly and professionally handle the plaintiff's claim against the Fund. As stated herein above, "An attorney may be held liable for negligence even if he or she committed an error of skill, knowledge and diligence."

[15] In my view, Scheepers, if indeed he was of the view that the offer which was on the table was inadequate, he should then have advised the plaintiff in clear and certain terms that he is not prepared to under settle his claim and in that case he should have done the honourable thing to withdraw from the matter and advise the plaintiff to go to another lawyer. In my view, Scheepers simply did not care a damn about protecting the plaintiff's interest. This is manifested by the very fact that for three years after he received instructions to prosecute the plaintiff's claim, he simply did not collate sufficient evidence to place him in a position to quantify the actual or approximate value of the plaintiff's claim. Scheepers did not know, as it came out from cross examination, what the future loss of earning capacity of

the plaintiff was, *inter alia*. The contention by Scheeprs that the plaintiff insisted that the offer which was on the table should be accepted cannot, in my view, hold water. The failure to obtained sufficient evidence for almost 3 years, is telling against Scheepers. The plaintiff was not placed in a position to make an informed decision as to the true value of his claim, when he was informed of the offer which was on the table. In my view, Scheepers cannot hide behind the alleged insistence of the plaintiff that they must accept the under settled offer. The negligence of Scheepers in handling the plaintiff's claim is unpardonable. I find that Scheepers was negligent in under settling the plaintiff's claim and equally liable to the plaintiff's proven damages. I find that the plaintiff's claim against the defendants has been proven, notwithstanding the fact that the plaintiff did not testify.

[16] The fact that the plaintiff did not take the stand, is in my view, of no great moment, regard being had to the concession already made by Scheepers that the claim was under settled. In the final analyses, I therefore conclude and find that Scheepers was liable to the plaintiff for under settling the plaintiff's claim. The instructions were not given to Scheepers in his personal capacity but as a member of the first defendant. In the result any negligence on the part of a member of the first defendant, which results in any liability of such member, such liability embraces all the members of the first defendant as they are all vicariously liable.

[17] In the result this Court finds and orders that the defendants are jointly and severally liable, the one paying the other to be absolved, to pay any proven damages of the plaintiff occasioned by the under settling of his claim against the Road Accident Fund arising from the injuries he sustained in the motor vehicle collision which occurred on the 19 February 2008 along N4 Highway in Ngodwana, Mpumalanga Province, together with costs of this action.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 02 / 03 / 2016

PLAINTIFF`S ADV : ADV PIET UYS

INSTRUCTED BY : SEKONYA ATTORNEYS

DEFENDANT`S ADV : ADV E LABUSCHAGNE SC

INSTRUCTED BY : SAVAGE JOOSTE & ADAMS