REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED	
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DATE	SIGNATURE

CASE NO: 58767/15

In the matter between:

TSHIAMO KGOSI MOROLONG **PLAINTIFF**

And

MMUSO OSCAR LEKETI **FIRST DEFENDANT**

ROAD ACCIDENT FUND **SECOND DEFENDANT**

JUDGMENT

COLLIS J:

INTRODUCTION

1. This is an action wherein the Plaintiff claims damages arising from injuries sustained by him in a collision which occurred on or about 13 October 2007. At the time of the collision the plaintiff was a passenger in a motor vehicle (*insured vehicle*) travelling on the Mahobieskraal /Bapong Road, North West Province. The driver of the insured vehicle lost control and capsized as a result of which the plaintiff sustained severe bodily injuries which has left the plaintiff in a quadriplegic state.

2. As against the first defendant the plaintiff claims damages based on a breach of contract and against the second defendant, the plaintiff's claim is based on a breach of a delictual duty of care after the plaintiff's statutory claim in terms of the Road Accident Fund Act 56 of 1996 has become prescribed.

3. At the commencement of the proceedings the plaintiff withdrew his claim against the first defendant and tendered the wasted costs occasioned by such a withdrawal. He elected to proceed only against the second defendant and in this regard the court was called upon to determine the *liability* of the Road Accident Fund separate from the quantum of the matter. In terms of Rule 33(4) the Court accordingly ordered such a separation.

ISSUES TO BE DETERMINED

4. In essence this court was called upon to determine two issues: Firstly whether a valid claim has been submitted to the second defendant and secondly, whether the second defendant has a duty of care towards the plaintiff where the plaintiff ostensibly still had an attorney on record.

5. As per the particulars of claim, the plaintiff's claim against the second defendant is formulated as follows:

> "10. The Plaintiff upon the express invitation of the Second Defendant lodged his claim directly with the Second Defendant on 30 October 2008, where after the Second Defendant acknowledged receipt of all necessary claim documents.

16. The Plaintiff having lodged his claim directly with the Second Defendant on 30 October 2008, the Second Defendant's statutory duties and obligations (as set out in the RAF Act) and as indicated on the Second Defendant's public communications) expressly and/or tacitly included inter alia the following:

16.1 That the Second Defendant would conduct all investigations and take all steps necessary and do all things ancillary to and in pursuance of the finalization of the Plaintiff's claim against the Second Defendant;

16.2 The Second Defendant would keep the Plaintiff informed and in particular advise the Plaintiff of the most suitable options available to him in respect of the amounts that the plaintiff may claim from the Second Defendant;

16.3 That the Second Defendant would inform and keep the Plaintiff informed of amendments to the Road Accident Fund Act alternatively case law relevant to the Plaintiff's claim against the Second Defendant.

17. The Second Defendant aforesaid in breach of its duties and obligations and duty of care arising therefrom:

17.1……..

17.2……..

17.3……..

17.4 Failed to inform the Plaintiff of when the Plaintiff's claim against the Second Defendant will prescribe as determined by the Road Accident Fund Act;

17.5 Failed to settle the Plaintiff's claim with the Plaintiff before prescription thereof." [1]

6. In response to the above pleaded case by the plaintiff, the second defendant responded as follows:

6.1 Save to admit that the Plaintiff lodged a claim with the Second Defendant on 30 October 2008, that the Plaintiff demanded payment witch the Second Defendant failed and/or refuse to pay, the Second

[1] Exhibit B p 3-14

Defendant has no knowledge of the remainder of the contents of these paragraphs and puts the plaintiff to proof thereof.[2]

6.2 The Second Defendant denies the contents of these paragraphs and pleads specifically that:

6.2.1 During or about 22 June 2009 the Plaintiff duly authorised Leketi Attorneys to act on the Plaintiff's behalf, which attorneys informed the Second Defendant that they are acting on behalf of the Plaintiff and filed a Special Power of Attorney and Letter of Authority with the Defendant. Copies of these documents are attached hereto as Annexure 'A' to 'C', respectively, to which this Honourable is respectively referred.

6.2.2 By virtue of having so instructed and authorised Leketi Attorneys, the existence of statutory duty or obligation which may have emanated from the Act or otherwise between the Plaintiff and the Second Defendant came to an end. The remainder of the allegations in these paragraphs are, by virtue of the above, denied.

EVIDENCE

7. Mr. Oscar Leketi was the first witness to testify on behalf of the plaintiff. It was his testimony that he was an attorney by profession and that he had been practicing for his own account for the last ten years. On 22 June 2009, he first obtained a mandate from the plaintiff to institute a claim against the second defendant for damages as a result of personal injuries sustained in a collision. At the time when he received an instruction, the plaintiff already had lodge a claim with the Road Accident Fund directly. On this day he handed to him copies of his identity document, a copy of his submitted RAF 1 claim form and copies of his medical records. On the same day the plaintiff also gave him the details of the driver of the vehicle in which he was a passenger at the time when the collision occurred. Following this initial meeting with the plaintiff, he then made telephonic contact with Mr. Selanga, an official employed at the Road Accident Fund during which conversation he had informed him that henceforth that he will be acting as the attorney of the plaintiff. Pursuant

[2] Amended Plea para 6 p 44

thereto a letter and his power of attorney was then forwarded to the second defendant.[3] In the days which followed, he then consulted with the driver in which the plaintiff was a passenger and he obtained his account of how the collision occurred. Given the version obtained he then advised the plaintiff that his claim would be limited to R 25 000.00. It was then that a mutual agreement was reached for his mandate to be terminated. He then informed the second defendant *via* letter dated 17 August 2009 and returned to the plaintiff his documents accordingly. It was also the testimony of Mr. Leketi that he had further advised the plaintiff in future to liaise with the second defendant directly.

During cross-examination, the witness reiterated his initial mandate to act on behalf of the plaintiff, which mandate was shortly thereafter terminated. He furthermore, confirmed that following the sending of his letter of termination that he never received an acknowledgment from the second defendant neither could he recall as to whether he at any point had made enquiries as to whether his termination of mandate was at all received by the second defendant.

8. Mr. Tshiamo Morolong testified that on 13 October 2007 he was involved on an accident wherein he sustained injuries to his spine and neck and that he was left a quadriplegic following the collision. Soon after the collision, he with the assistance of his mother, submitted his RAF 1 claim form and an affidavit as to how the collision occurred. He confirmed the contents of the affidavit,[4] and testified that because he was injured that the affidavit was deposed to by his mother. This was the same position with the completion and signing of the RAF 1 claim form appearing on Exhibit B pages 318-321, which form was submitted to the Road Accident Fund on 30 October 2008. Mr Morolong further confirmed having instructed Mr Leketi during June 2009 but soon thereafter having terminated his services. From around September 2009 and during the years which followed, he made several telephonic enquires directly with the Road Accident Fund during which time he had established that on

[3] Exhibit B pg 10,11,& 12
[4] Exhibit B p 312

their system that Mr Leketi was still listed as his attorney. On occasion he made telephonic contact with Mr Leketi and informed him that according to the system of the Road Accident Fund, that he was still listed as his attorney. Around December 2013, he then instructed Jerry Nkeli to represent him and assist him with his claim. Not much was done by this attorney and he then terminated this attorneys mandate on 9 January 2014.[5] Eventually during July 2015 he then instructed his current attorneys to represent him with his claim.

During cross-examination the witness confirmed that following the collision that he was unable to write for a while and was hospitalised for a period of two weeks and that he had spent 3 months in a rehabilitation centre. He only was able to write again during late 2009. He further confirmed that almost a year following the collision that he with the assistance of his mother submitted his claim to the Road Accident Fund. He once again confirmed not having signed the claim form before it was submitted to the Road Accident Fund. During cross examination he also confirmed that at the time when he instructed Mr. Leketi, around June 2009 that he was unable to sign the special power of attorney and that his mother was responsible for signing same. Mr Morolong also confirmed that following the termination of his mandate to Mr. Leketi that he was never given a letter of termination by Mr. Leketi. In relation to Exhibit A page 9, he also confirmed that he confronted Mr. Leketi with the contents of the letter but that Mr Leketi had advised him, not to complete the letter nor take it to the bank.

9. Ms Thabitha Morolong testified that she is the mother of the plaintiff and following her son's collision that he was left wheelchair bound. It was her testimony that on occasion when her son was too deposed to an affidavit as to how the collision had occurred that her son was unable to write and with the permission of the police official attending to them, she was permitted to sign his affidavit which was later submitted to the Road Accident Fund. She further testified that this was also the position with the completion of the RAF claim form, which was also signed by her as if she was the claimant.

[5] Exhibit C p 1

During cross-examination, Ms Morolong confirmed that she and the plaintiff have the same initials and that she had signed the forms as her son at that point in time was unable to write is own name. In relation to the affidavit deposed to by her, she equally conceded that prior to the signing of the affidavit, that she had been remiss to read the affidavit as it was written in English.

10. This then concluded the *viva voce* evidence presented on behalf of the Plaintiff.

11. The Defendant also then closed its case without presenting any evidence to rebut the viva vice evidence presented by the plaintiff.

THE LAW

12. Section 24 of Act 56 of 1996 provides as follows:

'A claim for compensation and accompanying medical report under section 17(1) shall-

(a) Be set out in the prescribed form, which shall be completed in all its particulars;

4(a) Any form referred to in this section which is not completed in all its particulars shall not be acceptable as a claim under this Act."

13. In addition to this, Section 19(f) of Act 56 of 1996 provides as follows:

"The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-

(f) If the third party fails-

(i) to submit to the Fund or agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which

particulars of the accident that gave rise to the claim concerned are fully set out; or

(ii) to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof."

EVALUATION

14. Mr Coetzee on behalf of the second defendant had argued that the claim form in the present instance was not signed by either the claimant/plaintiff or his attorney, but instead it was signed by his mother. In addition to this, he had submitted that the claim form specifically provides that where it is not signed by the claimant personally, the person who signs the form in a representative capacity is required to stipulate the capacity in which the claimant is acting, the full name and address of the claimant, the identity number of the person and the relationship to the claimant. In the present instance having regard to the form itself, it was not stipulated and it is on this basis that counsel had argued, no valid claim form was submitted to the Road Accident Fund for consideration.

    In addition to the above, counsel had argued that the failure by the plaintiff to have signed the claim form, only came to the knowledge of the Road Accident Fund during the trial and as such this failure of non-compliance with the provisions of section 24(1) (a), section 24(4) (a) and section 19(f) of Act 56 of 1996 could not have been raised on the pleadings.

15. In contrast counsel appearing on behalf of plaintiff had argued, that this court must remain mindful of the provisions of Uniform Rule 18(4) which requires of a pleader to set out " a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading….With sufficient particularity to enable the opposite party to reply thereto". Furthermore, that where a concession on the merits have been made by a party that party cannot at a later stage place any issue conceded in dispute. In this regard specifically, counsel referred this court to the pre-trial

minute[6] produce of a pre-trial meeting conducted on 24 October 2018, where at such meeting, the second defendant admitted the negligence on the part of the insured driver, the date, time and place of the accident and that the plaintiff was conveyed as a passenger. At such meeting it was further recorded that when the matter goes on trial the only triable issues that were recorded were to be the issue of prescription on behalf of the first defendant and whether the second defendant was notified of the termination of the mandate of the attorney on record for the plaintiff. It is therefore on this basis that Mr. Van Tonder had argued that the merits was not a disputed issue and as such non-compliance with any of the provisions of the Road Accident Fund cannot at trial stage be raised as a defence.

16. This Court having considered the submissions made by counsel for the second defendant, cannot agree with the submission made by counsel that the Road Accident Fund was precluded from amending its plea to bring such plea in line with the tendered evidence. It stands to reason therefore, that if the second defendant was of the opinion that this court should favourably have considered the provisions of section 24 and 19 respectively, its plea ought to have been amended to allege such non-compliance. In the presence instance this was not done and as such cannot now be considered by the Court as the plaintiff was not forewarned of such and cannot be expected to answer to a trial by ambush.

17. In addition to this, the concessions made by the second defendant during the pre-trial meetings as far as the merits are concerned, remains unqualified and as such this Court cannot just merely disregard same.

18. In the decision Gusha v Road Accident Fund 2012 (2) SA 371 (SCA) support for the above contention is found. In the cited decision, the court had found that the unqualified concession of the Road Accident Fund of liability renders it both impermissible and opportunistic for it now to attempt to introduce the claimant's contributory negligence in order to seek a reduction in the extent of

[6] Index to Pre-Trial Minute pg 44

its liability. The same reasoning can and should be applied in the present instance.

19. As for the triable issue raised during the pre-trial meeting conducted on 24 October 2018, the triable issue raised was the question whether the second defendant was informed of the termination of mandate of Mr. Leketi. His uncontroverted evidence on point was that he indeed had sent a letter to the fund informing them of his termination of mandate dated 17 August 2009. As no evidence in rebuttal was presented by the second defendant in this regard, this court must accept his evidence and consequently no merit could be found on this point.

ORDER

20. In the result, the following order is made:

    20.1 In terms of Rule 33(4) the Court orders a separation of the merits to be determined separately from that of the *quantum*;
    20.2 The Second Defendant is held 100% liable for the agreed or proven damages of the Plaintiff.
    20.3 The Plaintiff is awarded costs, including wasted costs of the proceedings of 21 August 2018.
    20.4 The trial on *quantum* is postponed sine die.

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COLLIS J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

For the Plaintiff	: Adv. H. Van Tonder
Attorney of the Plaintiff	: Edeling Van Niekerk Inc.
For the Second Defendant	: Adv. F. Brand SC & Adv. L.Coetzee
Attorney for the Defendant	: Tau Palane Inc.
Date of Hearing	: 15 November 2018
Date of Judgment	: 28 June 2019