



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 16255/2018

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
<u>03/03/2022</u>	
DATE	SIGNATURE

In the matter between:

BARNARD PATEL ATTORNEYS

First Applicant

(Registration Number: 2010/015078 /21)

STEPHAN LE ROUX

Second Applicant

and

CONRAAD ROBERT CHESTER

Respondent

In re: the matter between:

CONRAAD ROBERT CHESTER

Plaintiff

and

BARNARD PATEL ATTORNEYS

First Defendant

(Registration Number: 2010/015078/21)

STEPHAN LE ROUX

Second Defendant

JUDGMENT

MBONGWE J:

INTRODUCTION

- [1] This is an opposed interlocutory application to compel the Respondent (the Plaintiff in the main action) to furnish certain outstanding further particulars the Applicants (the First and Second Defendants in the main action) had requested, but were refused by the Respondent on the grounds of either irrelevance or privilege. For brevity, the parties are referred to herein as in the main action.

FACTUAL MATRIX

- [2] The Plaintiff instituted action proceedings against the Defendants on 27 February 2018 claiming damages. The facts or occurrences constituting the basis upon which the Plaintiff relies for its claim are set out in his particulars of claim as follows:

2.1 At all material times hereto, the Second Defendant was:

2.1.1 employed by the First Defendant;

2.1.2 acting in the course and scope of his employment with the First Defendant, alternatively, in the furtherance of the interests of the First Defendant and in particular during the period 19 September 2013 to April 2016.

- [3] During about 15 January 2012, the Plaintiff was admitted to the Life Riverfield Lodge ("the Lodge") as a high risk suicidal patient.

[4] The Plaintiff, acting personally, and the Lodge represented by the Second Defendant, entered into an oral agreement ("the agreement") the material express, alternatively tacit or further alternatively implied terms were that:

4.1 the Lodge would admit the Plaintiff for purposes of the assessment, diagnose the cause of and, within the remit of their field of expertise, treat the Plaintiff's complaints/condition, ("the Undertaking");

4.1.2 the Lodge would perform the Undertaking for reward and with the requisite degree of skill and expertise;

4.1.3 the Lodge would make available to the Plaintiff:

4.1.3.1 the hospital, medical and nursing facilities, equipment and apparatus reasonably required for purposes of performing the care.

4.1.4 the Lodge's legal duty of care to the Plaintiff enjoined it to:

4.1.4.1 provide treatment of, *inter alia*, mental health disorders, including general psychiatry as well as drug and alcohol rehabilitation;

4.1.4.2 provide treatment with the degree of skill and expertise then possessed and exercised by reasonable members of the nursing fraternities;

4.1.4.3 ensure that the protocols in place for suicidal patients are adhered to;

4.1.4.4 ensure that high risk suicidal patients, such as the Plaintiff are regularly observed and activities monitored and supervised within the Lodge;

4.1.4.5 ensure that high risk suicidal patients' freedom within the Lodge are restricted;

4.1.4.6 ensure that high risk suicidal patients do not gain access to unsupervised areas of the Lodge which were not defined as safe, contained and under supervision.

4.2 As a result of the Lodge's negligent breach of the Agreement and legal duty of care, the Plaintiff attempted to commit suicide on 20 January 2012 and sustained injuries consisting of inter alia:

4.2.1 fractured pelvis with extensions of the fractures into acetabulum on the right hand side;

4.2.2 fractured mandible;

4.2.3 fractured the spinous processes of the cervical spine;

4.2.4 fractured left tibia and fibula and right femur. ("the medical condition")

[5] On about 19 September 2013, and at Pretoria, the Plaintiff acting personally and the First Defendant represented by the Second Defendant and Madelien Sillands duly authorised thereto, concluded a written agreement ("the Written Agreement").

5.1 The material express, alternatively tacit or further alternatively implied terms of the Written Agreement were as follows:

5.1.1 the First Defendant would investigate, if meritorious, institute and prosecute a medical negligence claim/s on behalf of the Plaintiff for payment of his damages which the Plaintiff may be entitled in consequence of his medical condition ("the mandate");

- 5.1.2 in execution of the mandate, the First Defendant would exercise the degree of skill and expertise then possessed and exercised by reasonable attorneys in the circumstances;
- 5.1.3 the First Defendant would execute the Mandate for reward.
- 5.2 In execution of the Mandate, the First Defendant, inter alia:
 - 5.2.1 brief counsel to prepare the Particulars of Claim and Summons and cause this action to be instituted in the High Court, Gauteng Division on behalf of the Plaintiff under case number 2969/2015 against the MEC for Health, Gauteng Province. ("the Action);
 - 5.2.2 acquire knowledge of the existence and liability of the Lodge towards the Plaintiff arising from the Agreement, breach thereof and breach of the legal duty of care resulting in the Plaintiff's medical condition.
- [6] Despite and in breach of the Written Agreement and Mandate and in particular during the period 19 September 2013 to April 2016 the First Defendant:
 - 6.1 Failed to investigate the Plaintiff's medical condition and the circumstances surrounding the cause of his condition at all alternatively in a reasonable and adequate manner.
 - 6.2 Failed to commission a report from the appropriate medical expert before the action.
 - 6.3 Failed to obtain the Plaintiff's patient file from the Lodge to determine the circumstances surrounding the Plaintiff's condition.
 - 6.4 Failed to take adequate and timeous steps to bring proceedings against the Lodge.
 - 6.5 Failed to take any alternatively adequate regard for the evidence

concerning the admission of the Plaintiff to the Lodge and breach of legal duty of care towards the Plaintiff.

6.6 Permitted the Plaintiff's claim against the Lodge to become prescribed in terms of the Prescription Act, 1969 (Act 68 of 1969).

6.7 Failed to execute the Mandate timeously, reasonably, and with the requisite degree of care and skill.

[7] As a result of the breach of the Agreement, the Plaintiff has suffered damages in the sum of R4 050 000,00 which amount is calculated and computed as follows:

7.1 Past medical and hospital expenses: R100 000.00

(a) The amount claimed is an estimate.

(b) Vouchers supporting these expense will be discovered and made available in due course.

7.2 Past and future loss of earnings R2 500 000.00

(a) The amount claimed is an estimate.

7.3 Future medical expenses: R450 000.00

(a) conservative treatment consisting of Consultations, physiotherapy and Medication – R100 000.00

(b) Consultations with an occupational Therapist R50 000.00

(c) Consultation with a psychiatrist and psychotropic medication – R50 000.00

7.4 General damages:

R1 000 000.00

(a) The amount is an estimate.

(b) The estimate makes provision for pain, suffering, loss of amenities of life and disfigurement. It is not practicable to apportion an amount to each head of damages.

TOTAL

R4 050 000.00

[8] The Plaintiff's claim against the Lodge became prescribed on the 19 January 2015.

THE DEFENDANTS' REQUEST FOR FURTHER PARTICULARS

[9] Aside the further particulars that have been requested and furnished, the Defendants seek, in the present application, further particularity the Plaintiff contend are extraneous to the provisions of Rule 21(4) and has, consequently, refused to furnish same reasoning that the particulars requested are not necessary for the Defendants to prepare for trial and/or are privileged information.

ANALYSIS

[10] It is common cause that the Plaintiff had prior to appointing its current attorneys, consecutively employed the services of three other firms of attorneys, including the First Defendants, to pursue his claim.

[11] The request for the specific further particulars withheld by the Plaintiff's attorneys comes, on the face of it, as a consequence of common cause knowledge by the Defendants and their attorneys that the Plaintiff had

previously instructed other firms of attorneys to pursue his claim and/or, from the contents of the correspondence between the Plaintiff and his erstwhile attorneys that has been disclosed in the Plaintiff's discovery affidavit, and/or pertains to pleaded facts relating to the circumstances of the occurrence of the events set out in para 4, above.

- [12] The Plaintiff alleges to have instructed the First Defendant, who was represented by the Second Defendant and another person, on the 19 September 2013 to pursue his claim as detailed above. The claim against the Lodge, having arisen on 20 January 2012, was due to become prescribed and did prescribe on the 19 January 2015 while in the hands of the First Defendant.
- [13] The request for the unfurnished further particulars leading to the present application arose mainly from allegations by the Plaintiff that the first Defendant was instructed to;

"investigate, if meritorious, institute and prosecute a medical negligence claim/s on behalf of the Plaintiff for payment of his damages which the Plaintiff would have been entitled to in consequence of his medical condition" ("the agreement");

and that;

In the execution of its mandate, the First Defendant "could and should have acquired knowledge of the existence and potential liability of the Lodge towards the Plaintiff arising from the agreement, breach thereof and breach of the legal duty of care resulting in the Plaintiff's medical condition..."

- [14] Central in this matter and the requested particulars is Defendants' denial of knowledge of the existence of a possible claim against the Lodge. This denial is amplified by the admission sought in the request for further particulars that

the Plaintiff has never mentioned the Lodge or a potential claim against the .Lodge to the Defendants.

- [15] The Court, in considering the request for further particulars, is not bound by the pleadings, but can go beyond them [see *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 402 – 403]. On the authority of this principle, I consider the rule of legal practice, with specific reference to the practice of attorneys, that where a subsequent attorney is instructed by a client to take over the further prosecution of a claim that is already being attended to by another attorney on behalf of the client, the subsequent attorney communicates the mandate he has received and send a termination of mandate to the attorney already handling the matter and call for the handing over of the client's file.
- [16] Needless to state that the newly instructed attorney then peruses the file to acquaint himself with the matter so as to map the way forward. It would and should have been during this process that the Defendants should have come across the correspondence discovered in the discovery affidavit of the Plaintiff wherein reference is made to a potential claim against the Lodge, and gained knowledge of the existence of that claim.
- [17] The adverse advice contained in that correspondence to the Plaintiff is immaterial and it may well be that the Plaintiff had approached the First Defendant as a result of the advice contained in that correspondence; to instruct another attorney for his claim against the Lodge. The relevant part of the advice given to the Plaintiff in that correspondence reads thus;

“My voorstel is da tons focus op die nalatigheid saak teen die hospitaal. Dit staan jou natuurlik vry om die saak teen Riverfield Lodge na 'n ander prokureur te verwys om te hoor of hulle jou sal bestaan. Indien jy dit doen, pleit ek by jou om voor die tyd die koste implikasie met hulle te bespreek.”

- [18] The existence of the claim against the Lodge would and should, therefore, have come to the knowledge of the First Defendant during the period September

2013, when the mandate was given and accepted, and 19 January 2015. It is noted that the First Defendants had been handling the plaintiff's matter until April 2016 (*para 1.5.2 on page 005-7 on caselines*). The "existence of a potential claim against the Lodge" was or ought to have been within the knowledge of the Defendants, as alleged by the Plaintiff. The Defendants' allegation that "*they are in the dark as to how they could have acquired knowledge of the existence and potential liability of the Lodge towards the plaintiff*" lacks merit and may point to negligence.

[19] Furthermore, the details of the mandate the Plaintiff may have given to his erstwhile attorneys are, as it were, privileged information. The mandate to the Defendants could have been different and in line with the recommendation that the Plaintiff instructs another attorney for the matter concerning the Lodge. Thus, to seek to rely on what the mandate to Plaintiff's erstwhile attorneys was, is disingenuous.

[20] Worst still is that, reading from the discovered correspondence the Defendants rely on, the Plaintiff had two claims – the one against the Provincial government the 'former' attorneys of the plaintiff were expressly committed to pursuing.

CONCLUSION

[21] I'm inclined to agree with the Plaintiff's refusal to furnish the requested further particulars in the circumstances of the facts and the findings thereon and, in particular, the finding that the Defendants ought to have gained knowledge of the existence of the Plaintiff's claim against the Lodge. The application accordingly stands to be dismissed.

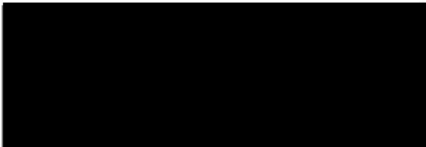
COSTS

[22] The general principle is that costs follow the outcome of the matter.

ORDER

[23] In light of the findings in this Judgment the following order is made:

1. The application is dismissed.
2. The Defendants/ Applicants are ordered to pay the costs.



M. MBONGWE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

APPEARANCES

For the Applicant: Adv T. Cooper
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Date of hearing: 06 September 2021.

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES/ LEGAL REPRESENTATIVES ON THE 03RD MARCH 2022.