

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A184/17

In the matter between:

DE VRIES SHIELDS CHIAT INC

Appellant

and

M B

Respondent

JUDGMENT: TUESDAY 30 APRIL 2019

DESAI, J:

1. The Appellant is a law firm. It apparently specialises in personal injury cases. The Respondent is a former client who successfully sued the Appellant for its alleged failure to exercise due care and diligence in prosecuting his claims.
2. The matter comes before us with the leave of the Trial Court. The ambit of the leave granted is restricted as follows:

“Leave to Appeal is granted ... on the question as to whether the Court had erred in the analysis of the Respondent’s pleadings in respect of the pleaded cause of action.”

In effect, we are called upon to decide whether the mandate as pleaded by the Respondent encompassed the breach, if such, found by the Court as having been committed or, in other words, whether the pleaded case alleged the duty that was found to have been breached.

3. The law in this regard is fairly settled. The Supreme Court of Appeal in Minister of Safety and Security v Slabbert [2010] 2 All SA 474 (SCA) at para [11] held as follows:

“A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at a trial. It is equally not permissible for the Trial Court to have recourse to issues falling outside the pleadings when deciding the case.”

This dictum has been cited with approval by the Constitutional Court in Molusi v Voges 2016 (3) SA 370 (CC) at para [28].

4. In this instance it is the Appellant’s case that no actionable breach or negligence relevant to the Respondent’s cause of action as pleaded had been established. The Respondent denies this allegation. It is his case that the Appellant had breached its mandate in that ... :

- i) It failed to do whatever was reasonably necessary to recover damages on behalf of the Respondent; and

ii) Appellant failed to exercise due care and diligence in prosecuting his claim against the RAF; and

iii) In failing to provide the Respondent with legal advice in respect of the said claim

as pleaded on his behalf.

5. These differing points of view warrant a closer examination of the pleadings and, more especially, the actual findings of the Trial Court and whether it erred in its analysis of Respondent's pleadings and its pleaded cause of action.

6. The injuries which the Respondent sustained occurred in or about August 2001 when the vehicle in which he was a passenger collided with another vehicle. The Respondent was then a teenager. It appears that as a result of the said injuries he received medical treatment, was disabled, and suffered pain and loss of amenities of life. The Appellant was subsequently instructed to recover the damages to which the Respondent was entitled in law.

7. Some five years later, that is in or about February 2006, the Respondent's claim was settled in an amount of R30000.00 being for general damages and R217,63 in respect of medical expenses. No undertaking was obtained in respect of future medical expenses.

8. It is this settlement with which the Respondent was unhappy and it eventually led to a protracted trial before **Saldanha, J.**

9. In the pleadings before the said Court it was alleged that the Respondent suffered damages due to a breach of its mandate by the Appellant who, he says, *inter alia*:

- i) failed to exercise due care and diligence in both prosecuting Respondent's case and in furnishing him with legal advice; and
- ii) failed to properly assess the quantum of his claim; and
- iii) neglected to send the Respondent for certain medico-legal assessments; and
- iv) neglected to assess the Respondent's need for future medical expenses as well as the degree of Respondent's disability.

10. As **Advocate Schalk Burger SC** who appeared for the Appellant, correctly pointed out, the mandate to recover damages was a typical instruction to an attorney to recover damages on behalf of a client injured in a motor collision and the alleged breaches are unexceptional.

11. When he completed the medical report – the report filed with the Road Accident Fund – **Dr M Verdoorn** says that the Respondent was treated with analgesics and referred for physiotherapy which was to take place over six weeks. His report is dated 4 September 2001. The referral to physiotherapy is specifically pleaded at paragraph 6.1.1 of the Respondent's particulars of claim. However a duty on the Appellant to ensure that this occurred was not pleaded as an element of the mandate furnished to the Appellant, nor was any allegation made in the pleadings

that the failure to ensure that the Respondent attended physiotherapy as recommended by Dr Verdoorn constituted a breach of the Appellant's mandate.

12. Unsurprisingly therefore, no reference was made during the trial to a file note of the Appellant dated 13 September 2001 that the Respondent's sister undertook to inform the attorney concerned '*waar haar broer vir fisio gaan*'. (See Volume 4 page 312). The Respondent was not asked why he did not go for the physio and, if he could not afford it, why did he not go to a provincial hospital for such treatment. He was then a teenager and would have qualified for such assistance without any charge. He was not asked about it because it was not a pleaded issue.

13. Incidentally, when the attorney was cross-examined about this, her view was that attorneys do not send people to doctors, others do it. During the trial reliance was placed by the Respondent on the Appellant's failure to ensure that he was assessed by a physiotherapist, and sent for physiotherapy, after the later recommendation of Dr Sagor on 21 October 2004 that provision should be made for the cost of physiotherapy. This too was not a pleaded issue. Further, the evidence in chief of Dr Le Roux (who testified as an expert for the Respondent) was that:

“ Wat is die effek dokter van die feit dat hy nou nie mediese behandeling gekry het nie, weet u? --- Die problem is indien 'n sagteweefselbesering van die nek of rug binne die eerste twee jaar nie voldoende behandeling ontvang nie, is die kanse baie

groter en is dit waarskynlik dat die simptome permanent kan wees.”

(See Volume 2 page 117).

14. The two year period referred to by Dr Le Roux ended in August 2003. It is common cause that the Respondent only complained about back problems to the Appellant in March 2004, during a telephone call made by the attorney to him.
15. It appears that **Saldanha J** was not completely satisfied with the evidence of the orthopaedic surgeon **Dr J Sagor**. Unlike **Dr Verdoorn** who saw the Respondent some ten days after the collision, **Dr Sagor** saw him some three years later. At that stage there was no neurological discomfort and the only clinical finding by **Dr Sagor** was a slight loss of rotation in his neck which was subjective in nature. He could make no other findings other than the Respondent’s subjective complaints. Testifying twelve years after seeing the Respondent, **Dr Sagor** expressed the view that the medication and physiotherapy – as the Respondent had at that stage not received a full gamut of treatment – could help clear up these “minor complaints”.
16. **Dr Sagor** did not agree with the Court’s suggestion that the attorney should have obtained an assessment from a physiotherapist. He commented in this regard:

“... except that it is not the attorney’s duty with due respect, to send clients for treatment ...”

Despite the somewhat sarcastic response from **Advocate R Liddell**, who appeared on behalf of the Respondent both before us and at the trial, one could hardly quarrel with **Dr Sagor's** remark quoted above.

17. **Dr Sagor** was subjected to a great deal of questioning as to why he did not refer the Respondent for physiotherapy. It seems that **Saldanha J** was of the view that **Dr Sagor**, the orthopaedic surgeon who examined the Respondent a number of years after the collision, had a duty to do so even though he was not his patient. However the trial court then concludes that it was the responsibility of the Appellant, that is the attorney, to advise the Respondent of the need for him "to obtain the necessary physiotherapy treatment".

18. The Court finds:

"I must mention though that Dr Sagor did not entirely impress with his explanation as to why the Plaintiff was not referred by him to a State hospital for physiotherapy. That however, in my view, was the responsibility of the Plaintiff's own attorneys at the time in that they should have advised him of the need for him to obtain the necessary physiotherapy treatment in order to deal with his ongoing pain and discomfort."

(See Volume 7 at pages 564 – 565).

19. The above finding was unrelated to the mandate or the alleged breaches. It was not part of Appellant's mandate and there was no allegation in the pleadings.

20. **Saldanha J** in fact characterises it as the "critical basis" of the Respondent's case ...

"The fact that the Defendant both through Mr Adendorff and Ms Saayman had not advised Plaintiff to go for physiotherapy as recommended by both Dr Verdoorn and their own specialist, Dr Sagor ...

... in the specific circumstances of this matter (there was) a responsibility on the part of the Defendant to have informed the Plaintiff of the need for him to go for physiotherapy ..."

(See Volume 7 at page 563).

21. As **Burger SC** points out, the negligence attributed to the Appellant – namely, the failure to advise the Respondent of the need to obtain the necessary physiotherapy treatment – did not arise from any duty assumed by the Appellant in terms of any mandate or alleged breach of a duty of care or a delictual claim. It is unrelated to any failure to properly assess Respondent's claims and quite clearly does not amount to a failure to give legal advice.

22. There is a further leg to the arguments advanced by Burger SC, namely causation. In the light of what is said above it is probably unnecessary to deal with this aspect in any detail.

23. As already stated, due to the issues raised on the pleadings, certain significant factual issues were not dealt with during the trial. There was no **evidence** as to what **Dr Verdoorn** told the Respondent in October 2001. Nor was the trial court told what Respondent would have done if **Dr Verdoorn** indeed advised him to go for physiotherapy in October 2001. The Respondent did not go of his own accord for physiotherapy even when he was in a position to afford private healthcare. Moreover, other than the testimony of his own expert, Dr Le Roux, which did not assist the Respondent, no evidence was adduced as to what effect the physiotherapy might have had on his symptoms had the Respondent followed Dr Verdoorn's recommendation.

24. It seems to me that there is considerable merit in the submission that no actionable breach or negligence relevant to Respondent's cause of action as pleaded has been established.

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

- 1. The appeal succeeds with costs.**
- 2. The judgment of the *court a quo* is set aside and replaced with the following:**

"The claim is dismissed with costs".

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DESAI, J

I agree

.....
CLOETE, J

I agree

.....
SALIE-HLOPHE, J