REPORTABLE

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

Case No: 5087/2017

In the matter between:

MAVIS NODABONE MAGONGO **Plaintiff**

versus

DERCKSENS INCORPORATED **Defendant**

HEARING DATE: 7 & 8 June 2023

JUDGMENT DELIVERED ON 9 JUNE 2023

ADHIKARI, AJ

[1] The plaintiff issued summons against the defendant for damages arising from an alleged failure by the defendant, Dercksen's Incorporated, its member or employee ('the defendant') to timeously prosecute a claim on her behalf against the Road Accident Fund ('RAF').

[2] Dercksen's Incorporated, is a firm of attorneys based in Knysna, in the Western Cape.

[3] In the particulars of claim the plaintiff pleads that during or about September 2009 the defendant accepted instructions from her to institute a damages claim against the RAF on her behalf in respect of injuries sustained by the plaintiff in a motor vehicle accident which occurred on 11 July 2009. The plaintiff further pleads that the defendant negligently failed to lodge her claim with the RAF and that as a result her claim prescribed.

[4] At the close of the plaintiff's case, the defendant applied for absolution from the instance on the basis that there was no evidence that the plaintiff had instructed the defendant to act on her behalf.

THE TEST FOR ABSOLUTION AND APPLICABLE LEGAL PRINCIPLES:

[5] The correct approach to an absolution application is conveniently set out in *Gordon Lloyd Association v Rivera and Another*:[1]

> *'The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in the case of Claude Neon Lights (SA) Ltd v Daniel ... .*
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> > *'When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonable to such evidence could or might (not should, nor ought to) find for the plaintiff. The plaintiff has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim.* [footnotes omitted]

[6] The Court has a discretion to grant or refuse absolution and, in the exercise of this discretion, the Court would normally not have regard to credibility of witnesses unless there was a serious issue regarding the credibility of such witnesses to the extent that the Court was unable to place any reliance upon them and the Court may also have regard to the possibility that the plaintiff's case may be strengthened by evidence emerging during the defendant's case.[2]

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1 *Gordon Lloyd Association v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-93A.
2 *Mafokeng v Moloi* (2014) ZAFSHC 140 (4 September 2014) at para [21].

[7] At the absolution stage the plaintiff's evidence should hold a reasonable possibility of success for her and in the event that the Court is uncertain as to whether the plaintiff's evidence has satisfied this test, absolution ought to be refused.[3]

THE ISSUES IN DISPUTE:

[8] The two primary issues in dispute are whether the plaintiff's claim against the defendant has prescribed and whether on the merits the plaintiff has proven that the defendant accepted an instruction to act on her behalf to prosecute a claim against the RAF.

[9] The defendant bears the onus of adducing evidence in respect of the question as to whether the plaintiff's claim against the defendant has prescribed and the plaintiff bears the onus in respect of all other issues in dispute.

[10] The plaintiff was thus required to first call her evidence on the issues in respect of which she bears the onus. It was then open to the plaintiff after leading her evidence to call on the defendant to lead its evidence in respect of the issue of prescription in respect of which the defendant bears the onus,[4] or to close her case after leading her evidence.[5]

[11] The plaintiff in this matter elected to close her case after leading her evidence, and the defendant as it was entitled to do, sought absolution from the instance on the basis that the plaintiff had failed to make out a *prima facie* case that she had been accepted as a client by the defendant.

THE EVIDENCE:

[12] The plaintiff was the only witness that gave evidence. The plaintiff testified in *isi*Xhosa with the assistance of an interpreter. The plaintiff testified that she has a good memory and that she had attended school up to Grade 10.

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3 *Build-A-Brick BK en 'n Ander v Eskom* 1996 (1) SA 115 (O) at 123 A - E.
4 *Merchandise Exchange (Pty) Ltd v Eagle Star Insurance Co Ltd* 1962 (3) SA 113 (C) at 114H–115A.
5 Rule 39(13).

[13] The plaintiff testified in chief that she was injured in a motor vehicle accident that took place on the N2 near Tsitsikamma on 11 July 2009 while enroute to a funeral in Lady Frere.

[14] According to the plaintiff's evidence in chief, she was travelling with seven other people as a passenger on the back of a bakkie. Aside from the eight passengers on the back of the bakkie, there were two other persons in the cab of the vehicle, one being the driver of the vehicle and the other a passenger seated inside the cab of the vehicle. The plaintiff testified that the vehicle was swerving in and out of the road and that she was thrown around on the back of the vehicle, sustaining injuries to her back and pelvis and that as a result of her injuries she was hospitalised.

[15] The plaintiff testified that she was hospitalised from 11 July 2009 to 20 August 2009 and that after she was discharged from the hospital, she approached attorneys to assist her as she had been advised by neighbours and by her doctors to approach an attorney for advice on seeking compensation for her injuries.

[16] The plaintiff testified in chief that in November 2010 she approached the defendant together with another passenger who was injured in the same accident.[6] The plaintiff consulted with Mr Dan Dercksen ('Mr Dercksen') of the defendant who asked her questions and then told her to go the Knysna police station to make an affidavit. The plaintiff and the unnamed fellow passenger then went to the Knysna police station and made an affidavit. They returned to the defendant's offices on the same day and gave the affidavit to Mr Dercksen who then told her to leave and to return at a later stage.

[17] As Mr Patel for the defendant correctly submitted in argument on the application for absolution, from the objective evidence, including an incomplete or partial file note of the defendant dated 16 November 2009, which was produced

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6 The other passenger was not identified in the plaintiff's evidence.

pursuant to the defendant's notice in terms of Rule 35(3),[7] it is evident that the consultation in fact took place on 16 November 2009 and not in November 2010 as the plaintiff had testified.

[18] After initially testifying under cross examination that she had not consulted with Mr Dercksen, the plaintiff later testified that Mr Dercksen had asked her questions during the initial consultation, which she answered. The plaintiff maintained under cross examination that Mr Dercksen had told her to go the Knysna police station to make an affidavit, and that she had given the affidavit to Mr Dercksen on the same day. The plaintiff conceded under cross examination that after she had returned to the defendant's offices to give Mr Dercksen the affidavit, he had told her to leave and that he would contact her. She then left the defendant's offices.

[19] No other evidence was led in respect of what took place during the plaintiff's consultation with Mr Dercksen on 16 November 2009.

[20] The plaintiff testified in chief that she returned to the defendant's offices on numerous occasions after the initial consultation in order to find out what was happening with her case, but that every time she went to the defendant's offices she was told that Mr Dercksen was unavailable.

[21] Under cross examination the plaintiff testified that she had visited the defendant's offices once a year after the initial consultation to check on what was happening with her case.[8] The plaintiff eventually conceded under cross examination that she had only visited the defendant's offices on two occasions after the initial consultation and that on both those occasions, she had spoken with the receptionist and left messages for Mr Dercksen to contact her.

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7 The defendant did not request a copy of the file note in its Rule 35(3) notice dated 17 April 2023. The defendant in the Rule 35(3) notice, *inter alia*, requested a copy of the mandate agreement between the plaintiff and the defendant as well as all correspondence exchanged between the plaintiff and the defendant. It appears, however, that the file note was provided in response to the Rule 35(3) notice albeit not under cover of an affidavit.

8 In re-examination the plaintiff confirmed that she had visited the defendant's offices once a year after the initial consultation.

[22] In her evidence in chief the plaintiff testified that she eventually managed to speak with Mr Dercksen in July 2012 and that he told her on that occasion that *'he is not working with people who did not bleed'*. The plaintiff further testified in chief that Mr Dercksen then threw her file at her and told her to go to someone else for assistance. Under cross examination the plaintiff conceded that Mr Dercksen had not thrown the file at her but that he had instructed his staff to draw her file and that the file had been placed on the reception desk whereafter Mr Dercksen told her to take her file.

[23] The plaintiff did not discover any documentary evidence indicating that she gave the defendant a mandate to act on her behalf or that the defendant accepted a mandate to act on her behalf. The plaintiff did, however, discover a copy of the power of attorney entered into with her current attorney of record. In cross examination the plaintiff was shown the power of attorney and asked whether there was a similar document contained in the file that she had received back from Mr Dercksen, to which she responded that there was no such document in the file.

[24] The plaintiff was asked in cross examination whether there were any documents in the file that she had received from Mr Dercksen in which she had given the defendant permission to obtain the police docket in respect of the accident or to obtain her hospital records. The plaintiff conceded that there were no such documents in the file. The plaintiff was also asked in cross examination if there were any documents in the file explaining how fees and expenses would be paid. She conceded that there were no such documents in the file that she had received from Mr Dercksen.

[25] The plaintiff did testify that there was a document missing from the copy of file that was discovered but she stated that this document allegedly shows that the file was closed either in 2009 or in 2012 – the plaintiff's evidence in this regard is somewhat unclear. The plaintiff testified that she was certain that the missing document exists but could she not state where it was although she thought that it may be at her home. The plaintiff could not explain why the missing document was not discovered.

[26] The plaintiff accepted under cross examination that the only documentary evidence before the Court relating to the question as to whether she had been accepted as a client by the defendant was a file cover on which the plaintiff's personal details and the date of the accident are recorded, a sheet noting the date of the accident and an incomplete file note dated 16 November 2009. The incomplete file note records only the plaintiff's personal details and certain details of the motor vehicle accident.

DISCUSSION:

[27] The cardinal question that arises in an application for absolution from the instance is whether the plaintiff has, by way of evidence adduced, crossed the low threshold of proof that the law sets at this midstream point of the proceedings.[9]

[28] In deciding whether to grant or refuse absolution I must assume that the evidence adduced by the plaintiff is true as there are no special considerations that dictate otherwise.[10]

[29] The sum total of the evidence adduced by the plaintiff in respect of the issue as to whether the defendant had accepted an instruction to prosecute a claim on her behalf against the RAF is that:

> [29.1] The plaintiff had one consultation with Mr Dercksen on 16 November 2009.
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> [29.2] In that consultation Mr Derckesen had asked her questions.
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> [29.3] The plaintiff answered the questions put to her by Mr Dercksen.
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> [29.4] Mr Dercksen then asked the plaintiff to go to Knysna police station to depose to an affidavit regarding the accident.

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9 *De Klerk v ABSA Bank Ltd and Others* (2003) 1 All SA 651 (SCA) (6 March 2003) at para [1].

10 *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C–D.

[29.1.1] The plaintiff went to Knysna police station and deposed to the affidavit as she had been asked to do by Mr Dercksen.

[29.1.2] The plaintiff then returned to the defendant's offices and gave the affidavit to Mr Dercksen.

[29.1.3] Mr Dercksen took the affidavit and told the plaintiff to leave and that he would contact her.

[29.1.4] The plaintiff had no other consultations with Mr Dercksen or any other employees of the defendant.

[29.1.5] Mr Dercksen returned the plaintiff's file to her in 2012 and told her to seek advice elsewhere.

[30] Mr Patel submitted in argument that there was no evidence to support the plaintiff's contention that the defendant had accepted her as a client.

[31] Mr Msuseni for the plaintiff conceded in argument that the only evidence before the Court substantiating the plaintiff's claim that she was accepted as a client by the defendant is that the plaintiff had an initial consultation with Mr Dercksen on 16 November 2009, a file was opened, the plaintiff was sent to the Knynsa police station to make an affidavit concerning the accident, the plaintiff returned to the defendant's offices and gave the affidavit to Mr Dercksen.

[32] Contrary to Mr Msuseni's submission the evidence on record does not even on a prima facie basis establish that the defendant had accepted the plaintiff as a client or that the defendant had accepted a mandate to prosecute a claim on the plaintiff's behalf against the RAF.

[33] All that the evidence demonstrates even on the most generous interpretation is that the plaintiff had an initial consultation with Mr Dercksen and that Mr Dercksen had said that he would revert to the plaintiff but did not do so.

[34] There is no documentary evidence supporting the plaintiff's claim. Indeed the documentary evidence before the court demonstrates no more than that the plaintiff had an initial consultation with Mr Dercksen on 16 November 2009.[11]

[35] Further the plaintiff conceded that the file that she had received from Mr Dercksen did not contain a written mandate, or an agreement in relation to the payment of fees or a power of attorney authorising the defendant to obtain her medical records and the police report in respect of the accident. Any attorney who accepts a mandate from a client to prosecute a claim against the RAF would require a client to provide the aforementioned documents in order to prosecute a claim against the RAF.

[36] The most probable inference to be drawn[12] from the fact that no such documents were contained in the file that the plaintiff received from Mr Dercksen is that the defendant did not accept the plaintiff as a client.

[37] Crucially, the plaintiff did not testify that Mr Dercksen had said that he would prosecute her claim or that Mr Dercksen had stated that he would act on her behalf. The plaintiff gave no details at all about what took place during the consultation. The high-water mark of the plaintiff's evidence is that Mr Dercksen asked her questions which she answered. The plaintiff gave no evidence as to what was asked of her during the consultation and she gave no evidence as to what her responses to Mr Dercksen's questions were.

[38] The plaintiff's evidence goes no further than demonstrating that she consulted with Mr Dercksen who told her that he would revert to her.

[39] Mr Msuneni contended in argument that it would be extremely difficult for the plaintiff as a lay person to prove that the defendant had accepted a mandate from her. This contention does not withstand scrutiny. Even in the absence of documentary evidence, all that the plaintiff needed to do to avoid absolution would

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[11] The allegedly missing document does not take the matter any further as the plaintiff claims that the document exists but she failed to discover the document.

[12] *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at para [7]. See also *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D.

have been to testify that Mr Dercksen had agreed to assist her with her claim against the RAF.

[40] While it is so that that Court may also have regard to the possibility that the plaintiff's case may be strengthened by evidence emerging during the defendant's case[13], in this matter the plaintiff has laid no basis for the defendant to lead any evidence in rebuttal and indeed the plaintiff's case is so weak that no reasonable court could find for her.

In the result I make the following order:

1. Absolution from the instance is granted with costs on the plaintiff's claim against the defendant.

2. The costs of the application for absolution shall be costs in the cause.

3. The plaintiff shall pay the defendant's costs of suit.

ADHIKARI, AJ

APPEARANCES:

Plaintiff's Counsel:	**Adv. M Patel**
Plaintiff's Attorney:	**Eversheds Sutherland South Africa Inc.**
Defendant's Counsel:	**Adv. T Msuseni**
Defendant's Attorney:	**Nandi Bulabula Attorneys**

[13] *Ruto Flour Mills (Pty) Ltd v Adelson* 1958 (4) SA 307 (T).