

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO.: 1355/2013

In the matter between:

NANDIPHA ELTER JACK

Plaintiff

And

ANDILE BALENI

First Defendant

NS NOMBAMBELA INCORPORATED

Second Defendant

JUDGMENT

BESHE J:

[1] The plaintiff in this action is suing the defendants for damages arising from first defendant's alleged professional negligence. The claim is for payment of R1 003 200.00 against defendants jointly and severally the one paying the other to be absolved.

[2] At the start of the proceedings, a separation of issues was ordered in terms of *Rule 33 (4)*¹. I ordered that the issue of liability should be proceeded with first with the issue of quantum postponed for determination later. These proceedings are therefore concerned with the determination of liability.

[3] The plaintiff is an adult female of Bolotwa Administrative Area, Dutywa. The first defendant is an adult male practising as an attorney. He practises as

¹ Uniform Rules of this Court.

such as part of second defendant. The second defendant is a firm of attorneys with offices at N.S. Nombambela Trust Building, corner Whack and Richardson Road, Dutywa. It is common cause that at all times material to this matter the first defendant was employed by the second defendant.

[4] It appears to be common cause that plaintiff approached the first defendant seeking advise with a view of instituting a claim for damages or of seeking recourse for damages suffered as a result of her husband's (the deceased) death following a collision between the deceased's vehicle and that one driven by **Mr Siphso Manakaza** (the insured driver). The collision occurred on the 11 February 2008.

[5] Plaintiff testified that following the passing of her husband as a result of the collision referred to above, **Mr Nombambela** of second defendant handled the matter relating to deceased's estate. However when she requested him to lodge a claim with the Road Accident Fund for damages suffered as a result of deceased's passing, **Mr Nombambela** referred her to the first defendant. She discussed the matter with the first defendant, who asked her to obtain the police report which she secured after a few days and handed same to the first defendant. On the following day she met with the first defendant in his office. The latter took out the police report, having perused it, opined that according to the sketch plan, the deceased was the sole cause of the collision. That she will not get any compensation from the Road Accident Fund, and further that any lawyer will tell her the same thing. According to the plaintiff, this happened less than a year after her husband's passing.

[6] The police report is a document entitled “ACCIDENT REPORT (AR) FORM” comprising of four (4) pages. The first page provides for the particulars of both drivers as well as those of their vehicles. The second page has various options as to type of motor vehicles, how the road is controlled, namely robot, stop sign etc, type of collision, for example head on etc, particulars pertaining to the road position of the motor vehicle before collision, damages to motor vehicles and a brief description of the accident. The description is preceded by the words “it is alleged”. There is no indication of who made the allegations though. Page 3 requires a summary of persons involved. No information is provided in this regard with most parts marked “Not applicable” (N/A). Page 4 provides for witnesses – none are reflected. Attached to the accident report is a sketch plan and key thereto. This is the sketch plan that the plaintiff alleges the first defendant based his opinion that Road Accident Fund is not liable on – or that deceased was the sole cause of the accident.

[7] Plaintiff testified that based on the first defendant’s advice, she did not pursue a claim against the Road Accident Fund.

[8] Plaintiff is a clerk at a school. In 2012 she attended the school’s athletics meeting. During the meeting, she got talking with a lady teacher at the school. Their conversation ended up with the lady teacher, **Ms Sgodi** enquiring about the progress of her claim with Road Accident Fund seeing she lost her husband in a motor vehicle collision. When she explained to **Sgodi** what happened, **Sgodi** told her of a good lawyer she knew who was looking for clients. **Sgodi** provided her with attorney **Mncwango’s** contact details. She got in touch with **Ms Mncwango**. She managed, at **Mncwango’s** request, to get her files from the second defendant.

[9] During cross-examination, it was put to the plaintiff that documents pertaining to the collision in question were requested from the police under cover of a letter from the second defendant and it was based on those documents that the first defendant formed an opinion that plaintiff did not have a case against the Road Accident Fund. But that he advised her to seek a second opinion from another attorney. Plaintiff insisted that the first defendant did not advise her to seek a second opinion. She stated that she does not recall if she was given a letter to take to the police to ask for documents concerning the collision.

[10] Regarding the securing of documents relating to the accident in question from the police, plaintiff testified that she obtained the documents from the Dutywa police. This after she was requested by the first defendant to get them. As indicated, she does not recall if first defendant gave her a letter to present to the police in this regard. Defendants' version is that it is the office of second defendant that requested these documents under cover of a minute which was delivered to the police by a messenger. The defendants initially did not discover any documents. However during plaintiff's cross-examination when an attempt was made to question her about a letter that was addressed to the police in this regard, this attempt was met with an objection from plaintiff's counsel. The objection was based on a complaint that the document/s the plaintiff was being cross-examined about had not been discovered. This resulted in a postponement to enable the defendants to make a discovery of the documents they intended using.

[11] Defendants' bundle of documents was handed in on a later date when the trial resumed after a postponement. Not much reference was made to the bundle

though much attention was given to the letter that was addressed to the police by second defendant's office. The bundle contains a letter that is addressed to the Station Commissioner, Idutywa Police Station and dated the 7 April 2008. The following documents are requested:

1. DAR from (*sic*).
2. Sketch Plan and key.
3. Statement (*sic*) of all witnesses.
4. Post-mortem report.

Certain documents form part of the bundle but the accident report is not one of them. Defendants' explanation for the absence of the accident report was that the accident report was already before court so they did not see the need to include it in their bundle. It was pointed out during cross-examination of first defendant by **Mr Cole** that there is no letter from the police to say herewith enclosed the following documents as requested by you (the defendants).

[12] Plaintiff was also questioned about a claim Vodacom instituted against the deceased's estate for a vehicle that was damaged during the collision in question. Plaintiff confirmed that the Vodacom matter was handled by **Mr Nombambela** on her behalf / on behalf of the estate of her late husband's estate. Summons in this regard form part of defendant's bundle. Could it not be that the letter addressed to the police sought documents in respect of this claim? In my view the most probable version in this regard is the version that was proffered by the plaintiff. First defendant stated that he considered the documents that were obtained from the police. He did not state with any particularity what exactly he considered. This in my view lends credence to plaintiff's assertion that first defendant only had regard to the police report that

she provided. The reason suggested by defendants for first defendant to visit the scene for an inspection *in loco* is that the report was not clear / helpful. He did not say that after considering all the documents provided to them by police he still could not make sense of the sketch plan. Hence I say plaintiff's version in this regard seems to be most probable of the two versions regarding what first defendant considered before giving his opinion.

[13] Plaintiff's attorney of record, **Ms Heather Pumla Mncwango** was the next witness to testify in support of plaintiff's case. She confirmed that a friend who she refers to as **Ms Sikoti** was responsible for her getting in touch with the plaintiff. Having consulted with the plaintiff, she realised that her claim against the Road Accident Fund had prescribed. She realised that had it not been for prescription, she would have had a claim against the Road Accident Fund because the collision occurred at an intersection. This was in view of the fact that 1% negligence on the part of the insured driver would be enough for a third party's claim. As a result, she lodged claims in respect of plaintiff and deceased's minor children against the Road Accident Fund. The claims were settled entirely by the Road Accident Fund.

[14] The first defendant testified that he was admitted as an attorney in 1998. That even before being admitted as an attorney when he did his articles of clerkship, he had been dealing with claims against the Road Accident Fund. He testified that he joined the second defendant in 2008. He confirmed meeting with plaintiff at their offices with whom he consulted about the motor vehicle accident in which deceased was involved. Because he did not have enough information about the collision, he wrote a letter to Dutywa Police Station requesting the relevant documentation. In due course he received the required

documents from the police after which he visited the scene of the collision. He then once again consulted with the plaintiff and informed her that in his opinion, having gone through the document received from the police and visiting the scene of the collision, deceased was the sole cause of the collision. He explained that the sketch plan was not of assistance because it had two points of impact. (That was but one of the deficiencies in the sketch plan.) Amongst other difficulties with the sketch plan is that it did not resemble the scene it was meant to depict. The marking or points on the sketch plan did not make sense. Measurements did not make sense. There were no marks at the scene as to where the motor vehicles ended up after the collision. First defendant state that he did not consult with insured driver to get more information about the collision because he reckoned he would exonerate himself. He also stated that it did not occur to him to find out whether there were any eye-witnesses. That is why he decided to go to the scene of the collision. The first defendant testified that he told the plaintiff it was open to her to seek a second opinion but in his “personal” opinion the deceased was the sole cause of the collision. The first defendant confirmed under cross-examination that he sought documents from the police with a view to recover / pursue plaintiff’s claim against the Road Accident Fund as instructed by the plaintiff. It also emerged that he visited the scene of the collision alone and the scene did not make any sense to him. This was due to the fact that the sketch plan did not resemble what he saw at the scene, stating that the sketch plan was unreliable. The first defendant denied that he accepted a mandate from plaintiff – saying he undertook an inspection of the scene of the collision to see whether there was a case or not. The first defendant was adamant that he did not accept a mandate from the plaintiff as a result of which he did not require the plaintiff to give him a power of attorney.

[15] The following is plaintiff's cause of action as it appears from her particulars of claim:

10.1 Sometime during 2008 after the deceased's death, the Plaintiff instructed the First Defendant, in his capacity as Attorney of this Honourable Court to take all steps necessary to institute a claim on her behalf for damages suffered by her in her personal as well as representative capacity on behalf of her minor children as a result of the death of deceased in the said accident.

10.2 The First Defendant was at all times material hereto employed and acting during the course and scope of such employment, with the Second Defendant.

10.3 The First Defendant duly accepted the mandate, which mandate required him to thoroughly investigate all aspects of the Plaintiff's claim for damages, and to make such decisions, and to make such recommendations as may from time to time be necessary for the proper conduct of the claim and to make such recommendations in the best interest of the Plaintiff.

10.4 The First defendant, then practising as an employee with the second Defendant duly accepted the mandate, which mandate require him to thoroughly investigate all aspects of the Plaintiff's claim for damages and to file a claim on behalf of Plaintiff against the Road Accident Fund, in accordance with the requirements of the Road Accident Fund.

10.5 The First Defendant whilst acting in his capacity as an Attorney of this Honourable Court advised the Plaintiff that her claim against the Road Accident Fund will not be successful as the deceased was the sole cause of the accident. As a result of this professional advice which was later found not to be true, the First Defendant failed to lodge the Plaintiff's claim within the time period allowed by the Road Accident Fund.

[16] It was contended on behalf of the plaintiff that the first defendant's failure to lodge plaintiff's claim resulted in plaintiff's claim prescribing and that therefore he is guilty of professional negligence. Further that he did not exercise the degree of care, diligence and skill to be expected of an average practitioner

before pronouncing on the prospects of plaintiff's claim against the Road Accident Fund.

[17] The failure to pursue plaintiff's claim resulted from the first defendant's opinion and resultant advice to the plaintiff that deceased was the sole cause of the collision. And that therefore the Road Accident Fund will not compensate her.

[18] It does not seem to be in dispute that when plaintiff wanted to discuss the lodging of the claim against the Road Accident Fund, she was referred to the first defendant by his partner **Mr Nombambela** who handled the winding up of deceased's estate. It is not in dispute that plaintiff held discussions with the first defendant and gave him instructions to lodge a claim on her behalf to the Road Accident Fund. It is further common cause that the first defendant sought the accident report from the police. The only dispute in this regard is the manner in which the accident report was obtained from the police. Evidence reveals that after going through the report and visiting the scene (although according to the plaintiff it was after consulting the sketch plan) the first defendant expressed the view that the plaintiff did not have a case against the Road Accident Fund because the deceased was the sole cause of the collision. See defendant's plea – 5.5 – where in relation to paragraph 10.5 of plaintiff's particulars of claim, defendants state that "Contents of this paragraph are correct in so far as the advice by the first defendant on the success of the claim, however the rest is denied and plaintiff is put to proof of the allegations. Defendant repeats the last sentence in sub-paragraph 5.4 above". The last sentence of paragraph 5.4 reads "Plaintiff was then advised by word of mouth by first defendant to consult any other attorney for another legal opinion". Defendants deny that plaintiff gave them a mandate to institute a claim against the Road Accident Fund on her behalf. The defendants' plea in this regard is somewhat

confusing. In her particulars of claim plaintiff alleges that the first defendant was instructed to take all reasonable steps necessary to institute a claim on her behalf. Defendants respond as follows in their plea:

AD PARAGRAPH 10 THEREOF

“5.1 First Defendant admits that he is an Attorney however denies the rest of the allegations set out herein. In amplification thereof 1st Defendant avers that when the plaintiff met with him she knew exactly what she wanted and she was referred to the 2nd Defendant’s office by the Master of the High Court for the administration of her late husband’s estate.”

In my view this can be understood to mean plaintiff knew what she wanted, with the estate issue being handled by **Mr Nombambela**, she wanted the issue of the claim against the Road Accident Fund attended to. The defendants do not dispute that **Mr Nombambela** referred the plaintiff to the first defendant in this regard. In his evidence the first defendant stated that he took the matter up and met with the plaintiff. He had a first meeting with the plaintiff in his office. Because he did not have the full particulars in relation to the motor vehicle accident, he made arrangements to obtain the relevant documents from the police. He agreed during cross-examination that he was instructed to pursue the claim against the Road Accident Fund. At times during cross-examination the first defendant conceded that the plaintiff gave him a mandate. But would also be heard to say he did not accept the mandate otherwise he would have made the plaintiff to sign a power of attorney. He denied that he was pursuing that mandate when he visited the scene of the collision for an inspection, stating that he wanted to verify whether there was a claim / case against the Road Accident Fund.

[19] In my view the verification and investigation the prospects of success of the claim is a necessary step towards instituting a claim. In my opinion, by

considering the accident report and visiting the scene of the accident, first defendant was carrying out plaintiff's instructions to pursue a claim against the Road Accident Fund.

[20] The question to be answered therefore is whether or not in doing so he exercised the degree of care, diligence and skill expected of an average practitioner.

[21] In argument, **Mr Cole** for the plaintiff submitted that as a bare minimum to enable one to formulate an opinion whether the plaintiff has a claim against the Road Accident fund, the average attorney would require *inter alia*: a statement from either one of the drivers or an objective witness as to how the collision occurred; an inspection *in loco* of the scene assisted by a witness to the accident; after gathering sufficient information about the accident, would take time to consider the law and the requirements of minimal degree of negligence before advising the plaintiff that she had no claim.

[22] In countering this argument, **Mr Nombambela** for the defendants submitted that the first defendant could not have accepted a mandate from the plaintiff not knowing whether she had a good claim or not. It was argued that all what the first defendant did was agree to investigate whether or not there was a case against the Road Accident Fund. He did not accept a mandate to pursue or prosecute the claim.

[23] In my view this argument loses sight of the fact that the advice by the first defendant stopped the process of lodging a claim against the Road Accident

Fund in its tracks. The plaintiff had entrusted him with the task of taking all the necessary steps to institute a claim on her behalf. After the initial step – investigating the prospects of the claim, the first defendant advised that the plaintiff did not have a case against the Road Accident Fund because the deceased was the sole cause of the collision.

[24] The defendants blame the plaintiff for not having approached **Mr Nombambela** who had been handling the deceased's estate to inform him about what the first defendant to whom he has referred her for the motor vehicle accident claim was saying. I do not think that this is a valid complaint or that it is of moment that the plaintiff did not do so. It has to be borne in mind that it is **Mr Nombambela** who referred the plaintiff to the first defendant to deal with matters relating to the claim against the fund. A partner in his firm. It must also be borne in mind that the plaintiff and her late husband were long standing clients of the second defendant. A point **Mr Nombambela** stressed over and over again. What business would the plaintiff have doubting advice given under these circumstances. What business did she have to second guess the first defendant's skill and competence? The situation may have been different had the first defendant (as he asserts) told the plaintiff she could go and seek a second opinion from another attorney. In that case, one could expect that she would go back to **Mr Nombambela** and seek his opinion. This in my view militates against the first defendant's assertion that he told the plaintiff she could seek second opinion.

[25] The question still remains: did the first defendant exercise the requisite care, diligence and skill in gathering information enough to enable him to give

proper advice or opinion as to the prospects of success of a claim for loss of support against the Road Accident Fund.

[26] I am not certain what the first defendant intends to convey when he repeatedly says it was his “personal opinion”. Clearly what he gave the plaintiff was a professional opinion – or his opinion as an attorney tasked with looking into lodging a claim with the Road Accident Fund. He offered the advice or expressed an opinion in that capacity.

[27] It is trite that if an attorney does not bestow sufficient care and diligence in the conduct of business entrusted to him, he is liable for the loss or damage suffered as a result of such lack of sufficient care, skill and diligence or loss arising out of his negligence in regard to client’s business entrusted to him.² By his own admission, the first defendant had to contend with an unhelpful / confusing sketch plan. The scene was even more confusing. This is not surprising because he visited the scene and conducted an inspection based on a confusing sketch plan, an accident report that did not provide much information and with no one to point out where and how the motor vehicles in question collided. He also does not seem to have considered the requirement relating to minimal degree or 1% fault required on the part of the insured driver for third party or dependants claim to succeed.

[28] I am unable to find that the first defendant exercised the degree of care, diligence and skill expected of an average practitioner. He did not exercise the degree of care, diligence and skill expected of an average practitioner. And by so doing, he acted negligently.

² See Steyn NO v Ronald Bobroff and Partners 2013 (2) SA 311 and authorities quoted therein.

[29] It is not in dispute that at all material times hereto, the first defendant was employed and acting during the course and scope of his employment with the second defendant.

[30] For the reasons stated above, the following order is made:

(a) The first and second defendants jointly and severally the one paying the other, are liable for the damages suffered by the plaintiff for loss of support arising out of the collision which occurred on the 11 February 2008 as a result of which the deceased died.

(b) The defendants are ordered to pay the costs of suit jointly and severally the one paying the other to be absolved.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff	:	Adv. SH Cole
Instructed by	:	HP MNCWANGOATTORNEYS C/O XM PETSE INC.
		4 th Floor – Suite 445
		Development House
		York Road
		MTHATHA
		Tel.: 047 – 531 1572
		Ref.: HPM/JCK/NSN
For the Defendants	:	Mr Nombambela
Instructed by	:	MESSRS NS NOMBAMBELA INC.
		No. 7 Beaufort Street
		MTHATHA
		Tel.: 047 – 532 6542
		Ref.: NSN/nvn/B-6512
Date Heard	:	5 May 2015, 24 and 25 August 2015
Date Reserved	:	25 August 2015
Date Delivered	:	26 May 2016