



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

In the matter between:

2/7/15

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

CASE NO: 52777/2011

INNOCENTIA MOSIMA MAREDI

Plaintiff

and

MKM ATTORNEYS

First Defendant

EXECUTOR (in the Estate of late H.M Nkosi)

Second Defendant

MASTER OF THE NORTH GAUTENG HIGH COURT

Third Defendant

CASE NO: 52778/2011

NAOMI MORONGWA MAREDI

Plaintiff

and

MKM ATTORNEYS

First Defendant

EXECUTOR (in the Estate of late H.M Nkosi)

Second Defendant

MASTER OF THE NORTH GAUTENG HIGH COURT

Third Defendant

J U D G M E N T

MAKGOKA, J

[1] These are consolidated actions, in which the plaintiffs claim damages from the first defendant (MKM Attorneys), a firm of attorneys, based on alleged professional negligence. Against the second defendant, the executor in a deceased estate, they claim the same relief in the alternative. The actions are a sequel to the death of Mr. Mause Abram Maredi (the deceased) who was killed by Mr. Happy Maluta Nkosi (Nkosi). The plaintiffs' claim is defended only by MKM Attorneys. The executor has not defended the action. There is no substantive relief sought against the third defendant, the Master.

[2] The plaintiffs are, respectively, the daughter and widow of the deceased. Under case 52777/2001 the plaintiff is the deceased's major daughter, who claims on her own behalf. Under case number 52778/2011 the plaintiff is the deceased's widow, who acts personally and on behalf of her three minor children of whom the deceased was the natural father. The genesis of the plaintiffs' claims is the tragic events of 11 August 2006. During a business meeting of shareholders and directors, Nkosi went on a shooting spree, killing the deceased and a Mr Masombuka in the process, and injuring others. Nkosi immediately thereafter committed suicide by shooting himself. The second defendant is the appointed executrix in the estate of Nkosi. In their particulars of claim, the plaintiffs allege that they were both dependent for maintenance and support on the deceased, and that as a result of his killing by Nkosi, they had suffered loss of support and maintenance, for which the estate of Nkosi is liable.

[3] As a result, so allege the plaintiffs, they instructed MKM Attorneys during 2007 to issue summons against Nkosi's estate for loss of maintenance. It is further alleged that MKM Attorneys negligently failed to carry out those instructions with the result that the plaintiffs' claim against Nkosi's estate became prescribed on 10 August 2009, being three years from the date of the deceased's death, alternatively 2 August 2010, being the date on which the inquest report was filed. The plaintiffs accordingly allege that they have no recourse against Nkosi's estate for their damages. According to the plaintiffs, MKM Attorneys also failed to inform plaintiff of the consequences of the prescription Act; and/or that circumstances existed which caused it to be unable to issue summons as instructed; and/or failed to properly investigate the amount of the assets and claims in favour of Nkosi's estate.

Alternatively, in the event it being found that the claim against Nkosi's estate did not become prescribed, plaintiffs allege that Nkosi's estate is liable for their respective alleged losses.

[4] In its pleas in both actions, MKM Attorneys pleaded that its mandate was investigate the possible shareholding of the deceased in various companies and the estate of Nkosi with a view of advising the plaintiffs on the prospect of claiming damages from Nkosi's estate as a result of the killing of the deceased by Nkosi. Furthermore, it was to file a damages claim with the Executor of the deceased estate of Nkosi on behalf of the plaintiff.

[5] The defendant admits that it did not issue summons against Nkosi's estate, for three reasons. First, that its investigations into Nkosi's estate revealed that there was little or no benefit that could accrue to the plaintiffs if actions were instituted against Nkosi's estate. Second, Mrs Maredi was properly advised of the risks associated with issuing of summons and the costs involved, on the one hand, and the prospect of recovering any significant amount from Nkosi's estate, on the other. Upon this advice, Mrs Maredi elected, in her personal and representative capacities on the one hand, and as representative of the plaintiff in case number 52777/2001, on the other, not to pursue litigation against Nkosi's estate. With regard to prescription, MKM denied that any claim against Nkosi's estate had been extinguished by prescription, for the following reasons:

- (a) MKM Attorneys filed a damages claim against Nkosi's estate in December 2007, and by virtue of s 13(1)(g) of the Prescription Act 68 of 1969 (the Prescription Act) the completion of prescription of the claims in question against the deceased estate of Nkosi was delayed until 1 year after the confirmation of the final liquidation and distribution account in respect of the said estate by the third defendant;
- (b) MKM Attorneys lodged an objection to the liquidation and distribution account drafted by the executor in Nkosi's estate during September 2008 which account did not reflect the plaintiffs' claims;
- (c) On 31 March 2011, after MKM Attorneys' mandate to act on behalf of the plaintiffs had been terminated, and immediately upon receipt of the amended liquidation and distribution account in Nkosi's estate from the Master, MKM

Attorneys informed the plaintiffs in writing to attend the Master's office should they wish to object to the said liquidation and distribution account (which again did not reflect the plaintiffs' claims).

[6] The plaintiffs each delivered a replication to the defendant's plea, in which they join issue with the defendant's allegation that it filed a claim against Nkosi's estate. In particular, the plaintiffs denied that MKM's alleged claim filed against Nkosi's estate in December 2007, constituted a proper claim as envisaged in s 13(1)(g) of the Prescription, in that it fails to specify the *causa* and/or *quantum* of the claim. The plaintiffs consequently denied that prescription became delayed as alleged by MKM Attorneys.

[7] The following facts are common cause, or cannot be disputed. Mrs Maredi's claim for loss of support for herself and her children was not included in the liquidation and distribution account dated 26 August 2008, nor the one dated 9 September 2010. Neither was any summons issued against Nkosi's estate for their claim. On the other hand, an action in which Nkosi's estate was sued in respect of bodily injuries sustained by other victims of Nkosi's shooting spree, was settled in this court in July 2010 in an amount of R3,6m. In terms of the settlement agreement, it was noted that a company known as Owl Eye Trading 110 had declared dividends in favour of Nkosi's estate in an amount of R5,9m.

[8] The issues of liability and quantum of damages were separated in terms of rule 33(4) of the Uniform Rules of Court. The trial proceeded on the issue of liability only. Only two witnesses testified – Mrs Naomi Morongwa Maredi (the plaintiff under case number 52778/2011) and Mr. DF Maritz, on behalf of MKM Attorneys.

[9] As stated earlier, Mrs Maredi is the widow of the deceased. She testified that she consulted with Mr. Maritz and instructed him to claim maintenance from the Nkosi's estate for herself and her three children. She also instructed him to claim the shares of the deceased in a company called Silver Unicorn Trading 33 (Pty) Ltd (Silver Unicorn). She instructed Mr Maritz to claim R5 million from the estate. Mr Maritz indicated to her that she might not get R5 million because there were other claims. She informed Mr Maritz that Nkosi's estate had money, as the latter was also a shareholder of Silver Unicorn.

[10] She told Mr. Maritz that a Mrs Patricia Mbiza was a shareholder and director of Silver Unicorn, and that she would know about the shareholding of the deceased in Silver Unicorn. She consulted with Mr Maritz a number of occasions, and on each occasion Mr Maritz would tell her there was no money in Nkosi's estate, while she asserted the contrary. In the end, she became dissatisfied with how Mr Maritz was handling her case, as she put it: 'He (Mr Maritz) did not do as I instructed him' and she eventually terminated her mandate to him and instructed her present attorneys of record.

[11] The following salient points emerged from the cross-examination of Mrs Maredi: She first instructed Mr Maritz during May 2007. She visited the offices of MKM Attorneys quite regularly, in some instances without an appointment. She was mainly assisted by Mr Maritz's candidate attorney, Mr Andile Zililo, who left the firm in October 2008 after qualifying as an attorney. It was put to her that after October 2008, after the departure of Mr Zililo, she stopped contact with Mr Maritz, a proposition which she denied. She testified that after the departure of Mr Zililo, she was often assisted by Mr Maritz's daughter, who is also an attorney.

[12] The last time she spoke to Mr Maritz after the departure of Mr Zililo, Mr Maritz informed her that there was nothing else he could do as there was no money in Nkosi's estate. He even suggested she should apply for voluntary surrender of her estate. It was further put to Mrs Maredi that there was no consultation between her and Mr Maritz for the period beginning of 2009 until September/October 2010. She stated that it was not because of lack of effort on her part that, because she tried on many occasions to see him, but Mr Maritz was not prepared to see her. Also, there was a period when Mr Maritz was indisposed and hospitalized. She would, however, visit the offices of MKM Attorneys and speak to Mr Maritz's daughter.

[13] She confirmed having received a statement of account from MKM Attorneys in October 2008, which Mr Maritz said it was not necessary for her to pay. She confirmed that Mr Maritz during one of the consultations showed her a liquidation and distribution account in Nkosi's estate from which it appeared that there was no money in the estate. However, she further stated that it was because the shares in Silver Unicorn were not reflected, that the account reflected the estate not to have

money. It was also put to her that after 15 October 2008, there was a consultation between him and Mr Maritz in which she was allegedly told that there was no point in pursuing a claim against Nkosi's estate and that she would have agreed. She denied that.

[14] Mr. Daniel Faure Maritz testified on behalf of the defendant. An attorney with over 30 years' experience, he testified that he initially instructed by Mrs Maredi in May 2007. The main instruction from her was very much to determine the shareholding in various entities. There was an allegation of a fraudulent sale of shares for R38 million. When Mrs Maredi approached him for the first time, her only complaint related to the money that her husband has invested in several companies. Her instruction to him was to determine and to prove that her husband had been defrauded by his co-shareholders. Emanating from the above, the other instruction was to lodge claim against the estate of Nkosi.

[15] His initial steps were to make a follow-up to the findings of the inquest into the death of the deceased. He also drafted an affidavit which was supposed to be signed by Mrs Patricia Mbiza regarding the shareholding of the deceased in Silver Unicorn. She obtained most of the information contained in the draft affidavit from Mrs Maredi and from a company search that he did. Mrs Mbiza attended his office in the presence of Mrs Maredi. However, she was not prepared to sign that affidavit, but she verbally confirmed the essence of what Mrs Maredi had told him about the shareholding. But he needed some form of verification that the information was correct. At that stage he had made a determination that Mrs Maredi and her children would have a claim against the estate of Nkosi as the latter had killed the deceased. But he also suspected that Maredi's estate was insolvent.

[16] On 27 September 2007 he wrote a letter to a firm representing various companies in which the deceased purportedly had an interest. He stated that his instructions were that the deceased was a shareholder and director of the following private companies:

- (a) Silver Unicorn
- (b) Nkundlakazi Trucks
- (c) Nkundlakazi Cargo

(d) Botshelo Investment Holdings

(e) Botshelo Transport Services

[17] Mr Maritz further stated his instructions to be that subsequent to the death of the deceased and one Masombuka, a 51% shareholding in Silver Unicorn held by Ndlukazi was purchased by the remaining shareholders of Silver Unicorn for R3 million. The majority stake in Silver Unicorn was then resold to a third party investor, for R38 million. As the deceased had a stake in both companies, he sought to verify the correctness of his instructions 'to assist in the winding up of the (deceased's) estate. He also sought the identity of the appointed executor in Nkosi's estate. On 23 October 2007 the attorneys responded, and stated that the deceased was never a shareholder of any of the companies, save for Inkundlakazi Cargo. The attorneys also pointed out that any claim by Mrs Maredi or the deceased's estate would be against Nkosi's estate.

[18] On 19 December 2007 Mr Maritz wrote to the attorneys appointed as the authorized agent of the executrix in Nkosi's estate. This letter is particularly important, as would appear later in the judgment. For that reason, the relevant portions of the letter are quoted in full:

1. We act on behalf of the beneficiaries and executrix of the estate late Mause Abram Maredi (estate No 25151/06). We are instructed that you are the appointed executor of the above (Nkosi's) estate, alternatively that you act as authorized representative of such executor.
2. Would you kindly advise whether our instructions are correct(?). If so, please note that we have been instructed to file a personal damages claim against the above estate, on behalf of the beneficiaries of the estate late Mause Abram Maredi.
3. You may be aware of the fact that the outcome of an inquest held at Pretoria on 3 August 2007 confirms that the death of the late Mr Maredi was caused by an offence by the late Happy Malutha Nkosi, which would constitute murder.
4. Pursuant to our enquiry, kindly confirm that you have determined the extent of interest that the deceased Mr Nkosi had in the following companies, in his capacity as shareholder and/or director:
 - (a) Silver Unicorn Trading (Pty) Ltd
 - (b) Owl Eye Trading 110 (Pty) Ltd

(c) Inkundlakazi Cargo (Pty) Ltd

(d) Botshelo Transport Services (Pty) Ltd

5. Would you also please provide us with an assessment of the net value of the estate and indicate to us who have submitted claims that have been approved by the Master. If a provisional or Final Estate Account has been drawn, would you kindly also provide such details(?).
6. We are currently instructed to determine the extent of our client's claim.

[19] The attorneys representing the executrix in the Nkosi's estate did not respond to that letter until about five months later, on 17 May 2008, and after Mr Maritz had, on 14 May 2008, threatened to lay a complaint against the attorneys with the Law Society of the Northern Provinces. In their response, the attorneys stated that a liquidation and distribution account had not been drawn up due to the fact that a property evaluation report had only been received a week earlier, on 12 May 2008. The attorneys further stated that they were awaiting a 'declaration of the deceased's shares' for the liquidation account to be finalized.

[20] During or about September 2008, so testified Mr Maritz, a liquidation account in Nkosi's estate 'came to (his) attention'. He immediately consulted with Mrs Maredi. His understanding was that there was no real value in the estate of Nkosi. It seemed to him that the executor was also struggling to get information regarding the shares as the values for shareholding was left blank. Mrs Maredi was in a precarious financial position. He had worked almost for free for her, and it came to a stage where he could not carry on like that. He explained to Mrs Maredi that from the liquidation and distribution account, there was no money in Nkosi's estate.

[21] He also brought to her attention that there was no provision for her claim in the liquidation and distribution account. As a result, he wrote a letter to the attorneys assisting the executrix in Nkosi's estate, dated 1 September 2008. In that letter, he stated the following:

'We confirm that you have already submitted a liquidation and distribution account to the Master's office and the nett value thereof excludes the value of shares in the companies indicated in our letter sent to you dated 19 December 2007. Kindly provide us with an assessment of the net value of the estate and indicate to us who have submitted claims that

have been approved by the Master and we will object to the account as our claim is not yet included.'

[22] On the same date, 1 September 2008, Mr Maritz wrote to the Master and stated the following:

'We have been informed by the attorneys (Modiba Attorneys) handling the above estate that a liquidation and distribution account has already been submitted with your office. On many occasions before the account was submitted to your office we have indicated to the attorneys that we are instructed to claim against the Estate for loss of support and maintenance on behalf of our client and minor children. The last correspondence was that the account was not yet drawn up due to the delays in their evaluation report. We therefore object to the account as submitted to the Master's office because our client's claim is not yet attended to.'

[23] On 17 September 2008 the Master acknowledged receipt of the letter and indicated that objection had been referred to the 'executor' for 'his' comments (sic). On 4 October 2008 Mr Maritz wrote to Mrs Maredi and confirmed that she had instructed him to 'retrieve our archived file content, which we enclose herewith ...'

[24] On 15 October 2008 Mr Maritz wrote a letter to Mrs Maredi and informed her that he had raised an objection to the liquidation and distribution account of Nkosi's estate and that the Master had acknowledged receipt and would revert to him in due course. He further confirmed what was discussed in an earlier consultation about the liquidation and distribution account which reflects that Nkosi's estate was entitled to 50% of the shares of Owl Eye Trading (Pty) Ltd and that the value thereof was not disclosed in the account. Mr Maritz further stated that there was no cash available on the remaining items of the account. The letter concludes with a statement calling for 'further instruction' from Mrs Maredi.

[25] Mr Maritz further testified that after the letter referred to above, Mrs Maredi did not provide any further instructions to him. She was in a financial precarious position and the estate of her late husband was insolvent. He discussed with her the problems encountered and the fact that the executor could also not furnish him with further information regarding the shareholding. According to him, until there was

concrete information about shareholdings, there was no way forward, and in his view 'the whole thing had stopped'.

[26] Between 4 October 2010 and 31 March 2011, there was no consultation between him and Mrs Maredi, especially after he wrote the letter to her on 15 October 2008. No effective consultation took place, although Mrs Maredi would occasionally come into the office. However, there was nothing else he could do for her without the required information concerning shareholding. As a result there was no effective consultation because she could not give further information to take further matter.

[27] Mr Maritz further testified that he did not issue summons because judging from the first liquidation and distribution account, and information at his disposal, this was not advisable. As the value of the shares could not be confirmed by executrix's attorney, the risk of instituting a formal action at that stage, and thereafter, was too high. This was discussed with Mrs Maredi on various occasions. According to him, it would have been highly irresponsible to issue summons with the information at his disposal. He went to great length to discuss this with Mrs Maredi, and that until new information comes to light, it would be far too risky to institute an action.

[28] There was no verification of her continuous claims that there was money in the estate. Although she was obviously unhappy about the advice, she agreed that to institute formal legal action would not be advisable. Nothing of significance happened after 15 October 2008 until 31 March 2011 when Mr Maritz received from the Master, the 'first and final liquidation account' in the estate of Nkosi, which showed a gross value of R3 049 058.

[29] During cross-examination, Mr Maritz reiterated his stance that his letter dated 19 December 2007, more fully referred to in para [18] above, constituted a claim filed claim against Nkosi's estate. He conceded however, that there was there was no formal claim lodged but all was done in the correspondence.

[30] He further conceded that when he discussed the difficulties in the matter with Mrs Maredi, he did not advise her of the risk of prescription because in his view, he had filed a claim and lodged an objection, which would delay prescription.

[31] From the evidence pleadings and the evidence summarized above Mrs Maredi and her daughter's instruction to MKM Attorneys was to file a claim against the estate of Nkosi, and if necessary, issue a summons against the estate, in each case. The issue is whether MKM Attorneys failed to carry out the mandate. To determine the issue, the following questions, to my mind, have to be answered:

- (a) Did Mr Maritz lodge a claim against Nkosi's estate?
- (b) If the answer to the above is in the negative, did Mr Maritz do all what was expected of him as an attorney, to gather the necessary information to enable him to lodge a claim against Nkosi's estate? Put differently, was Mr Maritz diligent in carrying out mandate entrusted to him?
- (c) Was there an agreement between Mr Maritz and Mrs Maredi that given the difficulties in verifying the shareholding of the deceased and Nkosi, summons should not be proceeded with?

[32] I consider the above, in turn.

Lodging of a claim

[33] Mr Maritz relies on his letter dated 19 December 2007 as a valid claim against the estate. In terms of s 13(1)(g) where the debt is the object of a claim filed against the estate of a debtor who is deceased, prescription is delayed by a year. In the case of a deceased estate there are no prescribed formalities for filing a claim. There is direct authority for the proposition that delivery of an informal notice of claim will be sufficient to cause delay of the completion of prescription.¹ In the present circumstances, a proper construction should be placed on the contents of the letter dated 19 December 2007 to determine what was intended thereby, and what a reasonable reader would understand it to convey.

¹ *Frasers Ltd v Estate Cohen* 1965 (3) SA 271 (O) at 274A.

[34] In this regard, the following should be borne in mind: This letter does not contain any amount claimed. It was also not framed as a claim, but rather more than an enquiry seeking information. The relevant paragraph states that 'we have been instructed to file a personal damages claim against (the estate) on behalf of the beneficiaries of the estate late Mause Abram Maredi.' In my view, even an informal one, a claim should contain sufficient particularity to enable the executor to make a determination as to what is being claimed against the estate.

[35] The penultimate paragraph of the letter makes it plain what the purpose of the letter was at that stage – to be appraised of the net value of the estate. It should also be borne in mind the view of Mr Maritz at that stage, and indeed throughout the relevant period – he was not persuaded that anything beneficial would come out of Nkosi's estate. There was nothing precluding him to state a figure in the letter as the amount claimed, pending verification of the information and quantification of the claim.

[36] It was common cause during the trial that an amount of R5 m was mentioned by Mrs Maredi as the amount she wished to claim. Mr Maritz could simply have put in that figure in the letter as the amount claimed against the estate. I am certain that had that been done, that claim would have appeared as a claim against the estate in the liquidation and distribution account he received in September 2008.

[37] It is safe to conclude that the only reason it was not included is because no reasonable reader of the letter would, in my view, have considered it as a claim against the estate. At best for Mr Maritz, it would have been construed as a notice of intention to lodge a claim, once all the necessary information was on hand. The last paragraph of the letter says so. I therefore conclude that the letter did not constitute a claim against Nkosi's estate, and therefore, did not delay completion of prescription.

Diligence

[38] In this regard, Mr Maritz did not attempt to get more information about the shareholding, if he was skeptical of the information furnished to him by Mrs Maredi. Besides, that information had been orally confirmed to him by Mrs Patricia Mbiza.

Apart from enquiring with an uncooperative attorney, he did absolutely nothing to verify the information. It should be borne in mind that Mrs Maredi gave Mr Maritz very detailed information which enabled him to prepare the affidavit that was supposed to be signed by Mrs Patricia Mbiza. That should have suggested to him that the information was credible. He could have easily verified the information from the company registration office or from the auditors of the various companies. He did not. For that reason I conclude that he was not diligent in carrying out the mandate entrusted to him.

Alleged agreement not to proceed with legal action

[39] Mr Maritz is adamant that on various occasions he consulted with Mrs Maredi and explained the difficulties regarding verification of the information, and the risks associated with legal action under those circumstances. He says eventually Mrs Maredi agreed that legal action against the estate be abandoned, until she could furnish further information on the matter. This, he testified, was early 2009.

[40] He was however, unable to provide a date on which such agreement was reached. He was unable to provide any consultation notes in this regard. He says that it was an oral agreement. This would have been a very important consultation for him because that would have meant that his mandate had come to an end without achieving what the client had initially instructed him to do.

[41] As a prudent and experienced attorney with over 30 years' experience, he would have kept meticulous notes of such consultations, and confirmed the agreement in writing. Mr Maritz conceded that he did not write a letter to Mrs Maredi confirming the alleged agreement and stating that he regarded the matter as having being finalized in terms of the alleged agreement, and that he was closing his file as a result. He informed neither the Master, nor the attorneys representing the executrix in Nkosi's estate of the termination of his relationship with Mrs Maredi. This explains why, as late as March 2011, the Master sent the final liquidation and distribution account to him. He did not inform Mrs Maredi of the risk of prescription, so that she could exercise her options to seek second opinion on her matter.

[42] It is because of that reason that Mrs Maredi continued visiting his office. It is clear from the totality of the evidence that throughout the relevant period, she still considered herself a client of the firm. Although Mr Maritz would be unwilling to see her, she would see his daughter. In his own evidence, Mr Maritz testified that during the relevant period, 'no meaningful consultations took place', thereby strongly suggesting that there was interaction between Mrs Maredi and the firm. This lends credence to Mrs Maredi's version that she wished to proceed with legal action against Nkosi's estate, and that there was no agreement to pursue legal action.

[43] I therefore find that Mrs Maredi has established her case on a balance of probabilities. MKM is liable to compensate her and her children for loss of support in the amounts as they may prove them.

[44] In the result I make the following order:

1. The first defendant is liable to compensate each of the plaintiffs under case number 52777/2011 and under case number 52778/2011 for their proven or agreed damages as a result of the failure of the first defendant to lodge a claim against the estate of late HM Nkosi and/or the first defendant's failure to timeously issue and serve summons against the estate of HM Nkosi, following the killing of Mause Abram Maredi on 11 August 2006 by Malutha Happy Nkosi;
2. The first defendant is ordered to pay the costs of this part of the action;
3. The determination of the quantum of the plaintiffs' damages is postponed *sine die*.



T.M. Makgoka
Judge of the High Court

Judgment delivered: 2 July 2015

Appearances:

For the Plaintiffs: Adv. J Viljoen

Instructed by: Malan & Mohale Attorneys, Pretoria

For the First Defendant: Adv. J Vorster SC

Instructed by: Savage, Jooste & Adams Inc, Pretoria

No appearance for the second and third Defendants