

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

REPORTABLE

Case no: 15380/2010

In the matter between:

BEBINCHAND SEEVNARAYAN

PLAINTIFF

Vs

GARLICKE AND BOUSFIELD INC

DEFENDANT

JUDGMENT

MADONDO J

[1] The plaintiff is Bebinchand Seevnarayan, a businessman of [...] Drive, Westville, KwaZulu-Natal and the defendant is Garlicke and Bousfield Incorporated, carrying on business as the firm of attorneys, notaries and conveyancers at 7 Torsvale Crescent, La Lucia Ridge, Umhlanga Rocks, KwaZulu-Natal.

[2] In this action the plaintiff sues the defendant for damages arising from the defendant's failure to execute an attorney – client mandate, given to it by the plaintiff, to prosecute the plaintiff's action against Essack until it prescribed. As a consequence the plaintiff suffered damages in the global amount of R1, 411, 443.60.

[3] During the period from April 1999 to March 2002, there existed a contract of mandate between the plaintiff and Ditz Incorporated (Ditz Inc.), a firm of attorneys. In

accepting such a mandate from the plaintiff Ditz Inc. was represented by Mr Colin Cowan ("Cowan"), who is now deceased.

[4] The essential terms of the contract were, firstly, that Ditz Inc. would act as plaintiff's attorneys. In so doing, it would exercise the skill, knowledge and diligence reasonably to be expected of an average practising attorney. Secondly, Ditz Inc. would, in particular, take all steps necessary to prosecute any claim which the plaintiff might have against Essack in relation to the sum of R800, 000.00 the plaintiff had deposited with Essack prior to 21 November 1996. Thirdly, the plaintiff would pay Ditz Inc. for its services at its usual rates.

[5] It was a term of the plaintiff's mandate to Essack that he, Essack, acting as the plaintiff's agent, would lend the aforesaid sum of monies to third party borrowers on terms approved by the plaintiff. It was further agreed between the plaintiff and Essack that the latter would not lend the said sum of R800, 000.00 to third parties without the prior knowledge and consent of the plaintiff, and without first obtaining adequate security from such third parties. However, Essack in breach of such mandate lent the said moneys to Bale Investments (Pty) Ltd and Aslam Cassim Peer, without the plaintiff's prior knowledge or consent and without first having obtained adequate security. This resulted in the plaintiff's claim for damages against Essack.

[6] During March 2002, with the consent of the plaintiff, the defendant firm assumed all the obligations of Ditz Inc. in terms of the mandate referred to above. In assuming the said obligations the defendant firm was represented by Cowan, its then executive consultant, who was then acting within the course and scope of his employment with the defendant firm or within his authority from it.

[7] At the time the plaintiff has a claim against Essack for damages in the sum of R800,000.00 which had in terms of section 12(1) read with section 12(3) of the Prescription Act no. 68 of 1969 (the Prescription Act) fallen due during April or July 1999. In breach of its mandate from the plaintiff, the defendant allegedly failed to take steps necessary timeously to prosecute the plaintiff's claim against Essack for damages in the sum of R800, 000.00. It only caused an action to be instituted against Essack under case no: 6082/2002 on behalf of the plaintiff on 2 October 2002. According to the defendant firm it had received the instruction from the plaintiff to prosecute an action against Essack in September 2002 and at the time the plaintiff's claim had already prescribed. However, it is undisputed that on receipt of the mandate the defendant firm did not inform the plaintiff that his claim had prescribed and dissuade him from instituting a worthless action against Essack.

[8] The case came before Msimang JP on 21 September 2010 and the plaintiff's claim was dismissed with costs on the ground that it had prescribed.

[9] As a result of the defendant's breach of its mandate the plaintiff had allegedly suffered the following damages which he would otherwise have recovered from Essack had the defendant firm not permitted his claim against Essack to prescribe:

- (a) The sum of R700, 000;
- (b) The sum of R411, 443.60, being the legal costs and disbursements paid by the plaintiff to the defendant firm in respect of his claim against Essack; and
- (c) The sum of R300, 000, being the costs which were due to Essack upon taxation.

[10] The bone of contention between the parties in the present case relates to when the defendant firm took over the mandate from Ditz Inc. According to the plaintiff it was in

March 2002, and to the contrary, it had been argued on behalf of the defendant firm that the file of the plaintiff's matter against Essack was opened by the defendant firm on 11 September 2002, and it was only then the plaintiff became a client of the defendant firm. This is crucial for the determination of the question whether or not the defendant firm allowed the plaintiff's claim against Essack to prescribe.

[11] Mr Troskie for the defendant firm has argued that the prescription of the plaintiff's claim against Essack is fundamental to any cause for action against the defendant. Without prescription the plaintiff has no potential cause of action to advance against the defendant. The onus therefore rests on the plaintiff to prove the prescription of the claim.

[12] It is common cause that the plaintiff became aware during April 1999 that Essack had made loans to the borrower without the security of mortgage bonds registered against property. The borrower had failed to repay the said loans or any part thereof. Also, it is not in dispute that in a letter dated 27 April 2002 Cowan advised the plaintiff that any claim he might have against Essack for damages might prescribe sometime in April 2002 and that in which event it was vital that summons should be issued against Essack at least prior to the end of March 2002 to prevent the claim from becoming prescribed. Cowan went on to state in the said letter that the plaintiff should treat the letter as "a further reminder to take up the matter with Essack without delay." The background to this letter according to Cowan was that some months ago the plaintiff had told Cowan to put a hold on the action against Essack since he intended to discuss the matter with him (Essack) personally. Cowan should wait for the plaintiff to give him a go ahead. The plaintiff has stated that he telephoned Cowan and asked him why he wanted to hear from him whether or not to prosecute an action against Essack and when. He then told him that as an attorney he should carry out his mandate and prosecute the action against Essack.

[13] It is not clear from the evidence tendered before this court as to why Cowan would ask a go ahead from the plaintiff if it had not been that the plaintiff had asked him to delay the prosecution of the action against Essack until he had talked to him personally. The plaintiff merely told Cowan over the phone that he should proceed with the prosecution on the action against Essack though Cowan had written him a letter. It would be more absurd for Cowan to ask the plaintiff, a lay person, to say whether or not he should proceed with the action if the plaintiff had not asked him to delay the action. The tone of the letter puts it beyond question that the plaintiff had asked Cowan to delay the action. In all probability the plaintiff had asked Cowan to delay the action against Essack until he had talked to him personally. It does not appear in the papers before this court and from the plaintiff's evidence as to when and how he had told Cowan to proceed with the action, if he did.

[14] It had been argued on behalf of the plaintiff that Cowan joined the defendant firm at the end of February or early March 2002. According to the defendant Cowan started with it in April 2002 and the plaintiff could not dispute this. Ms Boden, a director in the defendant's firm, testified that she knew this because on 25 March 2002 the defendant firm moved offices from Durban Bay House in the CBD to a building that was built in La Lucia Ridge. Boden at the time was the defendant's representative on the building committee tasked with arranging and sorting out the move. Cowan started with the defendant firm at the new premises on 1 April 2002. In the absence of the evidence gainsaying this, it should be accepted as the fact that Cowan started with the defendant firm on 1 April 2002.

[15] The question arises whether at the time the plaintiff's file relating to his claim against Essack had been transferred to the defendant firm. According to the plaintiff he was then a client of the defendant firm and his file in respect of his claim against Essack had

been transferred to and got into the packages of the defendant firm in March 2002. However, the plaintiff could not tender any concrete proof to that effect except his say so. On the other hand, Ms Boden testified that for the client to be accepted as the client of the defendant firm in respect of any matter there are many steps that have to be followed: The attorney who wishes to take on the matter on behalf of another client against another client has to ensure that nobody in the firm is involved in the matter. The second step, depending on the type of the matter that is being accepted is to comply with the Financial Intelligence Centre Act (FICA) which requires the attorney involved to obtain FICA documents from the client and to load those documents into the defendant firms records and to create a FICA file of those documents, which has a number assigned to it. It is only then, on the assumption that the matter raised no objection on a conflict search and that FICA has been complied with, a matter is opened in the defendant firm's bookkeeping department. In 2002 the taking on of matters and the assigning of matter codes and client codes were done at the bookkeeping department.

[16] According to Boden the matter against Essack was the fourth matter taken on by the defendant on behalf of the plaintiff and it was entered on 11 September 2002. This finds confirmation in the defendant firm's records relating to the date of instruction in respect of each matter received or opened by the defendant firm in September 2002 (exhibit "B"p12). Nonetheless, it has been argued on behalf of the plaintiff that this does not exclude an oral or tacit mandate having been accepted by Cowan as the defendant's duly authorised representative or by any other person of the defendants firm's professional staff to act on behalf of the plaintiff much earlier than 11 September 2002, and that the defendant led no evidence by the person who interviewed and opened the file for the plaintiff' but, the onus remained with the plaintiff to show that the defendant firm was given the mandate to prosecute his action much earlier than 11 September 2002. Unless and until the plaintiff

established a *prima facie* case that the instruction in question was received much earlier, before the action prescribed, the defendant was under no duty to give any explanation. See also Steyn No. N Ronald Bobroff & Partners 2013(2) SA 311 (SCA) at 321F. The Plaintiff could not say with any degree of certainty as to when the defendant firm became his attorney in his action against Essack. The only evidence available in this regard is found in the records provided by the defendant firm.

[17] That Cowan's Consultancy Agreement with the defendant firm was concluded on 27 February 2002 and Cowan started working as an attorney with the defendant firm on 1 April 2002, it does not necessarily follow that the plaintiff there and then became the client of the defendant's firm. But, Cowan had to transfer plaintiff's file to the defendant firm. Only once the file relating to this matter had been transferred to and entered into the defendant firm recording system would plaintiff become the client of the defendant firm. Mr Boden's evidence shows that a certain process had to be followed before any matter from Cowan had to be taken on by the defendant firm. Cowan was at all times material hereto possessed of the plaintiff's instructions relating to the plaintiff's claim against Essack when he joined the defendant firm which assumed all the obligations of Ditz Inc. However, the evidence does not disclose why the plaintiff's claim against Essack had only been transferred to the defendant firm in September 2002. The possibility that the plaintiff delayed in giving Cowan a go ahead with the matter, after Cowan's letter dated 27 February 2002, cannot be excluded. More so, this was not the only matter which the plaintiff had with Ditz Inc., there were also other matters which were transferred much earlier than the matter in question. Further, it is not in dispute that the process of transferring a matter from one attorney to another takes some time. There are FICA requirements to be complied with and it is only once all this had been done the client becomes the client of a new firm of attorneys. The delay could also be attributed to this lengthy process of transfer, it is not clear as to why

Cowan did not start with the file of the claim which was about to prescribe, if it had not been that the plaintiff had told Cowan to delay the claim against Essack until he had discussed the matter with him personally since there were other plaintiff's files which were transferred to this defendant's firm during May 2002.

[18] I now turn to determine when the plaintiff's claim against Essack prescribed. The plaintiff testified that he knew by April 1999 that Essack had breached the contract of Mandate which had been between the two relating to the investment of moneys. When Cowan joined the defendant company on 1 April 2002, the plaintiff's claim against Essack was still alive. According to the plaintiff in July 1999 Essack met him and Cowan and he, Essack, admitted negligence on his part, and also that he had lodged a claim with his professional indemnity insurer. This is corroborated by Cowan's file note dated 15 July 1999, Exhibit "B" p1. In Mr Choudree's submission the running of prescription against the plaintiff's claim was thereby interrupted in July 1999, as contemplated in section 14(2) of the Prescription Act. In the absence of any evidence to the contrary, the inevitable conclusion is that the plaintiff's claim against Essack prescribed in July 2002.

[19] It is not in dispute that Cowan whilst in Ditz Inc. wrote the plaintiff a letter dated 27 February 2002 informing him that his claim against Essack would prescribe in April 2002. The plaintiff testified that he subsequently telephoned Cowan and told him to proceed with the institution of the action against Essack. However, it has not been established whether at the time the plaintiff's matter in question had got into the package of the defendant firm, or when in relation to July 2002 that occurred.

[20] In terms of section 14(1) of the Prescription Act the running of the prescription is interrupted by an express or tacit acknowledgment of liability by the debtor. See also *Benson and another v Walker and others* 1984 (1) SA 73 AD at 86.

As it seems to be common cause that in July 1999 Essack acknowledged his indebtedness to the plaintiff and that in order to make that good he had lodged a claim for indemnity with his professional insurers, this had an effect of interrupting the running of the prescription in respect of the claim against Essack. Therefore, the claim had to prescribe in July 2002.

[21] It is apparent from the above and it is not in dispute that when the defendant firm through Cowan accepted a mandate to prosecute the plaintiff's action against Essack on 11 September 2002 the plaintiff's claim against Essack had already prescribed, and having no prospects of success. In the premises, the defendant firm cannot be held liable for the running out of the prescription against the plaintiff's claim. It follows that the plaintiff's claim that the defendant firm allowed his claim against Essack to prescribe cannot be sustained and it, therefore, falls to fail. This also renders it unnecessary for this court to consider whether or not the plaintiff has succeeded to discharge the onus resting on him to prove that but for the prescription of his claim against Essack, he would have succeeded in his claim against Essack and what damages he suffered as a consequence.

PLAINTIFF'S MANDATE TO DEFENDANT FIRM

[22] The unchallenged evidence by the plaintiff is that on accepting the mandate from him to prosecute his claim against Essack, the defendant firm did not tell him that the claim had prescribed and, nor did it dissuade him from pursuing a worthless action. This is evidenced by the subsequent conduct of the defendant firm thereto. An action for the recovery of damages from Essack resulting from his breach of a contract of mandate with

the plaintiff was instituted on 2 October 2002. Essack raised a special plea that the claim against him by the plaintiff had prescribed. However, Cowan assured the plaintiff that Essack's special plea of prescription would not succeed. The defendant firm filed a replication to Essack's special plea. The matter then came before the then Msimang JP on 21 September 2010, and it was dismissed on the ground of prescription.

[23] Notwithstanding the dismissal of the plaintiff's claim against Essack, Cowan and McDonald assured the plaintiff that he had good prospects of success on appeal. Following such an assurance, an opinion on the reasonable prospects was sought and paid for by the defendant firm from Ploos Van Amstel SC, as he then was. In an opinion dated 5 October 2010 Ploos Van Amstel SC indicated that there were no prospects of success on appeal and advised that the plaintiff could hold his attorneys liable for damages under their professional indemnity insurance scheme. It was only then the plaintiff understood that his claim against Essack had prescribed and that his attorneys would lodge a claim with their professional insurers, so to recover the losses. The plaintiff had paid the defendant firm the sum of R411, 443.60, being the legal costs and disbursements.

[24] Mr Cowan and Mr McDonald in a telephonic conversation asked the plaintiff to cool down since they had a professional indemnity insurance policy and he would get his money back. They then advised him to go and sue the defendant firm for damages. Nicholson, Stiller and Geshen compiled a file so that Mr Cowan would prepare a letter of demand and send it to the defendant firm. Shortly, thereafter, Mr Cowan committed suicide in November 2010.

[25] Nicholson and Stiller then told the plaintiff that there was nothing forth-coming from the insurer of the defendant firm and suggested that he should proceed with the issue of

summons. The present action against the defendant firm was then instituted. The plaintiff stated that as he was dealing with a very big firm of attorneys, the professional people, he expected the best advice. Had the matter prescribed, the defendant firm should have told him right away, he could have accepted the settlement offer and walked away. As a reasonable successful businessman he was not prepared to throw good money after bad one.

HAS THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANT FIRM PRESCRIBED?

[26] Mr Troskie for the defendant firm has argued that the special plea raising prescription of the claim against Essack was delivered in December 2002. By then the plaintiff knew or should have known, on the facts pleading prescription, that Cowan had breached his mandate, to prosecute the plaintiff's claim against Essack timeously. The plaintiff's claim against the defendant firm arose in December 2002, and the action in this matter was commenced in December 2010, eight years later.

[27] According to the defendant the plaintiff was informed by December 2002 when a special plea of prescription was filed, that the claim had prescribed. Mr Troskie for the defendant has therefore argued that the plaintiff's claim against the defendant firm started running from December 2002. The plaintiff should therefore, have there and then proceeded against the defendant for the recovery of damages, but he waited until December 2010; by the time the plaintiff instituted these proceedings any claim he had against the defendant firm had prescribed. He, therefore, has no claim against the defendant firm at all. Mr Troskie argued further, that knowledge of the legal conclusion is not required before prescription begins to run and neither the running of the prescription postponed until a creditor is aware of the extent of his rights.

[28] The prescription begins to run as soon as the creditors had knowledge of facts or information from which it will be possible for him to deduce or discover the identity of the debtor. See *Gericke v Sack* 1978 (1) SA 821 (A) at 829C. Section 12(3) of the Prescription Act provides that a debt not arising from the contract is deemed to be due and that prescription consequently begins to run, when the creditor has knowledge of the “identity of the debtor”, the alert creditor may interrupt the running of prescription by causing process to be served in terms of section 15. Section 15 (1) of the Prescription Act provides that prescription will be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. Section 15 (4) provides that if the creditor successfully prosecutes his claim to final judgment, prescription will commence running afresh from the day on which the judgment of the court becomes executable.

[29] Upon proper construction of section 15 the court in *Cape Town Municipality and Another v Allianz Insurance Company* 1990(1) SA 311 (C) at 312B stated that it is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt. Essentially, claiming payment of the debt is no different in principle from enforcing the right to payment of the debt. In *Santam Insurance Co. Ltd v Vilakazi* 1967 (1) SA 246 (A) at 254H, the majority of the court held that the process envisaged was one whereby action was instituted ‘as a step in the enforcement of a claim or right’ whereby the creditor formally involves his debtor in court proceedings for the enforcement of his claim.

[30] Prescription begins to run against a creditor when it has knowledge of the minimum facts that are necessary to institute an action. See *Claassen v Bester* 2012(2) SA 404 (SCA). It is the defendant’s contention in the present case that the plaintiff acquired knowledge of the facts that were necessary for it to institute an action against the defendant at the time

when a special plea of prescription was raised to his claim against Essack. However, in my view, for the facts the plaintiff had at the time of the special plea to be said that they were necessary to institute an action against the defendant firm, must have been sufficient for the plaintiff to make an informed decision on the matter. In *Santam Ltd v Ethwear* 1999(2) SA 244 (SCA) at 252I it was held that a debt becomes due in terms of the Act when the creditor acquires a complete cause of action, and the cause of action is the entire set of facts which a plaintiff must prove to succeed.

[31] In the present case the entire facts which the plaintiff had to prove was that his claim had prescribed, the defendant was responsible for the running out of the prescription against his claim and that he had no further recourse, other than claiming damages, resulting from such prescription. As Cowan and Smithers SC were dismissing Essack's special plea as delaying tactic and assuring the plaintiff that he had a strong winnable case against Essack, it cannot be said that the plaintiff had acquired a complete course of action. This was the case even after the plaintiffs' claim against Essack had been dismissed by the then Msimang JP on the ground of prescription. The unchallenged evidence of the plaintiff is that Cowan and Mr McDonald told him that he had good prospects of success on appeal, and blamed the dismissal of the action on the presiding Judge. It could not therefore be said that the plaintiff had at the time the entire set of facts necessary for him to institute an action against the defendant firm.

[32] Inquiry into what transpired from the time the plaintiff was told about the special plea raised by Essack and the subsequent conduct of the defendant firm up until the plaintiff's action was dismissed by Msimang JP, will help to determine when exactly the plaintiff acquired the facts necessary to institute an action against the defendant firm. The plaintiff testified that Cowan did not advise him that his claim against Essack had prescribed.

Notwithstanding, the fact that the claim against Essack had prescribed even before the defendant firm accepted the mandate of the said action, the defendant firm through Cowan, McDonald and Smithers SC vigorously prosecuted the action against Essack. It remained unexplained as to why the defendant firm caused the issue of summons against Essack, on a long prescribed claim. When the plaintiff talked about the special plea raised by Essack, Cowan dismissed it as a delaying tactic on the part of Essack and that he need not worry himself about it since it would not succeed. This is evident from the fact that after the receipt of the special plea by Essack, the defendant firm caused the replication to the said special plea to be drafted and filed and in which prescription on behalf of the plaintiff was denied.

[33] Cowan in an email dated 17 September 2010 communicated the defendant's view and strong advice to the plaintiff that his claim against Essack had not prescribed (Exhibit "A1" p2). The belief of the defendant firm that the plaintiff had good prospects of succeeding at the trial is more apparent from the conduct of Smithers SC when he dissuaded the plaintiff at the trial hearing from accepting an offer of settlement from Essack in the sum of R170, 000.00. When Mr McDonald, of the defendant firm, telephoned the plaintiff, after the dismissal of the plaintiff's claim by Msimang JP, advising him that he had lost the case against Essack, she blamed Msimang JP for "messing up the case". Notwithstanding the fact that McDonald was present in court during the trial hearing in the present case she was not called to refute this. Once again in Cowan's email dated 27 September 2010 the defendant firm expressed its view that there were grounds of appeal against the judgment of Msimang JP.

[34] After the receipt of the opinion of Ploos van Amstel SC that there were no prospects of appeal against the judgment of Msimang JP, Cowan told the plaintiff to relax and that he

would be covered by and paid out from the defendant's indemnity insurance. Cowan then advised the plaintiff to sue the defendant firm for damages and referred him to Nicholson, Stiller and Geshen for that purpose. Boden confirmed that the opinion on the reasonable prospects on appeal was sought and paid for by the defendant firm (exhibit "A1" p61) and that the defendant firm did lodge a professional indemnity claim in respect of the prescribed action against Essack.

[35] The unchallenged evidence clearly establishes that at all times relevant to this claim prior to the receipt of the opinion of Ploos Van Amstel SC on the reasonable prospects of success the plaintiff was made to believe that he did not only have a case against Essack but a strong and winnable case. Dismissal of Essack's special plea of prescription by both Cowan and Smithers SC as a delaying tactic and the filing of replication to it coupled with the fact that the opinion on reasonable prospects of success on appeal after the dismissal of the plaintiff's action by Msimang JP on the ground of prescription was sought and paid for by the defendant firm, provide sufficient proof that the defendant firm wrongly and erroneously believed that the plaintiff did not only have a case but a strong winnable case against Essack and advised the plaintiff accordingly. Being so misled, surely, the plaintiff cannot be said that he knew at the time that the claim had prescribed and that he was then entitled to sue the defendant firm for damages, resulting from its breach of the mandate.

[36] In terms of section 12(1) and (3) of the Prescription Act the prescription did not begin to run until the plaintiff was informed that his claim had prescribed, he had no reasonable prospects of success on appeal and that he could proceed against his attorneys for the recovery of losses he had suffered. The prescription of the plaintiff's claim against Essack for the resulting damages therefore commenced in October 2010. It was only then the plaintiff understood that his claim against Essack had prescribed and that the defendant

firm would lodge a claim with its professional insurers, so to recover the losses he had suffered.

DEFENDANT'S BREACH OF CONTRACTUAL DUTY TO PLAINTIFF

[37] The onus of establishing any other possible ground of liability rests upon the plaintiff. It has been argued on behalf of the defendant firm that it has never been pleaded in the plaintiff's particulars of claim that the defendant was negligent in any other way in the execution of its mandate except by allowing the plaintiff's claim to prescribe. The evidence of the plaintiff in this regard is clear that had the defendant advised him that his claim against Essack had prescribed, he would have taken an offer of R170, 000.00 made by Essack or negotiated a better offer with Essack. In essence, he said that he would not have pressured such a worthless action. Such evidence is, in my view, sufficient to cure a defect in the pleadings in this regard.

[38] The question then arises is what a reasonable attorney in the position of the defendant, faced with a similar case under similar circumstances, would have done. The attorney is by profession an adviser upon litigation, and other contestations and it is his duty to advise the client upon the prospects of success or failure and upon the impact of costs. See *Groom v Crocker* [1939] KB 194; *Lewis in Legal Ethics* PP 103-4 para 27.

[39] The duties and obligations of an attorney to his/her client and the circumstances under which an attorney can be liable for want of requisite care, skill and diligence which he/she is expected to exercise in handling the affairs of his/her client was considered in *Steyn No v Ronald Bobroff & Partners* 2013(2) SA 31 (SCA) at 320 C-H (para27), and it was held that in the execution of his mandate an attorney must act with the skill, diligence and

care required from an ordinary attorney. Nienaber JA in *David Trust v Aegis Ins. Co. Ltd* 2000(3) SA 289 (SCA) at 298G-H said the following:

“It is one of the naturalia of a contract of mandate in general, that the mandatory is obliged, first, to perform his functions faithfully, honestly and with care and diligence and, secondly, and of crucial importance, to account to his principal for his actions.”

[40] In *Steyn case supra*, at 320 para 27 the following was held:

“It is axiomatic that the conduct of a reasonable attorney concerning the case he/she handles will primarily be determined, amongst others by the facts and circumstances of the case, the investigations which had to be done, the nature and extent of the injuries suffered and the complexity of the matter.”

However, the degree of negligence or want of prudence or useless work depends on the nature of each case. The weight of authorities shows that negligence of the attorney in question can only be determined in relation to the facts and exigencies of the case as well as its complexity. The claim against Essack was about damages resulting from the breach of the contractual duty. This was a relatively simple matter, a reasonable attorney acting with the necessary care, diligence and skill on receipt of an instruction to prosecute a claim that had prescribed, would have easily picked this up and advised his client accordingly.

[41] The circumstances of the present case clearly show that in carrying out its mandate the defendant was obliged either personally or through others, to exercise the knowledge, skill and diligence to be expected of an average practising attorney. However, the unchallenged evidence clearly establishes that the defendant firm failed to maintain that standard in that, firstly, it negligently accepted the instruction to prosecute a prescribed claim, and secondly, it prosecuted such claim notwithstanding the fact that its prospects of success were virtually nil. Instead of advising its client that his claim had prescribed and dissuading him from pursuing a worthless litigation the defendant prosecuted the action against Essack and assured the plaintiff that he had good prospects of success. It persisted in

this even after the plaintiff's action had been dismissed by this Court. The negligence with which the defendant firm handled the matter for the plaintiff through Cowan and McDonald was of a gross nature, bordering on dishonesty or recklessness.

[42] McDonald's evidence was required to explain what transpired between the plaintiff and her and Cowan after the dismissal of the plaintiff's action. Surprisingly, she failed to throw light on this aspect despite the fact that she was in attendance at court. An adverse inference can reasonably be drawn from her failure to testify. This happened on the face of the evidence by the plaintiff that even before the dismissal of his claim she and Cowan assured him that he had a strong winnable case. In the result, I find that the defendant failed to act with due diligence, care and skill as an ordinary attorney would have acted.

PLAINTIFF'S ACTUAL LOSS

[43] It has been the defendant's contention that no cause of action is pleaded of the plaintiff being put to wasteful expense due to incorrect advice. It is accepted that the aggrieved party is the one to formulate and to prove a claim for damages. See *Dominion Earthworks v M J Greef Electrical Contractors (Pty) Ltd* 1970(1) SA 228(A) 235A. In my view, the defect in the plaintiff's particulars of claim has been cured by his unchallenged evidence that the result of the defendant's breach of its contractual duty to the plaintiff was the direct preliminary loss, which the plaintiff would not have suffered had the defendant properly advised him. The plaintiff suffered damages in the sum of R411, 443.60, being legal costs and disbursements, and the sum of R300, 000.00 he paid to Essack as costs on the dismissal of the plaintiff's action. I am satisfied that the plaintiff has made out a case for the award of actual loss he suffered as a result of the defendant's breach of the mandate. Therefore, the plaintiff's claim for his actual losses must succeed.

ORDER

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

- (a) The plaintiff's claim for the sum of R700, 000.00 as the damages the plaintiff would have allegedly recovered had his claim not been permitted by the defendant to prescribe, is dismissed with costs. Such costs to include the costs consequent upon the employment of a senior counsel;
- (b) The defendant is ordered to pay to the plaintiff the sum of R411, 443.60, being the legal costs and disbursements he paid to the defendant firm in respect of his claim against Essack, together with interest thereon at the rate of 15,5% per annum from the date of judgment to the date of final payment;
- (c) The defendant is ordered to pay to the plaintiff the sum of R300, 000.00 together with interest thereon at the rate of 15,5% per annum from the date of judgment to the date of payment;
- (d) The defendant is ordered to pay the plaintiff costs of suit, and such costs to include the costs consequent upon the employment of a senior counsel.

Date of reserved: 5 September 2015

Date delivered: 17 February 2015

Counsel for Plaintiff: Adv Choudree

Instructed by: David Randles

Ref: D Randles 031-3128311

Counsel for Defendant: Adv Troskie

Instructed by: Garlicke & Bousfield

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