

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 4056/2006

In the case between:

ELIZABETH ADRIANA CROUCAMP

Plaintiff

and

SCHOEMAN MAREE INC.

Defendant

JUDGEMENT:

MOCUMIE, J

HEARD ON:

2 – 5 SEPTEMBER 2008
and 16 OCTOBER 2008

DELIVERED ON:

26 JANUARY 2009

[1] The plaintiff is a 34 year old married woman. She instituted action against the defendant, Schoeman Maree Incorporated, a firm of attorneys, for the recovery of damages she suffered based on breach of contract. Plaintiff alleges that the defendant negligently caused her claim pursuant to the provisions of the Road Accident Fund, Act 56 of 1996 (*“the RAF Act”*), to prescribe.

[2] On 25 July 2001 plaintiff was involved in a motor vehicle

accident which took place in Bloemfontein as a result of which she sustained injuries. The parties agreed that the collision was the sole negligent driving of the driver of the motor vehicle with registration number BVJ579FS which was driven by a member of the South African National Defence Force (“SANDF”) on a private journey. On 25 June 2003 plaintiff engaged the services of the defendant, represented by Mr Jan Jacob Maree (“Maree”) a director, in the firm to recover damages she was entitled to in terms of the provisions of the Road Accident Fund (“the RAF”).

[4] It was common cause or not disputed that:

- 4.1 The plaintiff met with Maree on 25 June 2003 and gave him instructions to recover damages from the RAF on her behalf and he accepted the mandate.
- 4.2 The plaintiff although born and bred in Bloemfontein, South Africa (“SA”), was residing in the United Kingdom (“UK”) at the time of the accident but gave instructions to the defendant during one of her visits to SA;
- 4.3 The plaintiff furnished the defendant with all the necessary documents on 25 June 2003 to file and lodge

her claim with the RAF;

4.5 the plaintiff's claim prescribed in July 2004 whilst she was still resident in the UK.

Separation of issues in terms of Rule 33(4)

[5] When the trial commenced the parties agreed that the determination of the merits and the quantum be separated. This agreement was made an order of the court. The case proceeded on the basis that paras 9,10 and 11 should be determined first and the issues in para 8 will be adjudicated at a later stage.

[6] The plaintiff was the only witness that testified in support of her case. Maree testified in his defence.

[7] The plaintiff testified that on the advice of her father, Advocate Paul Heymans (*"Heymans"*), a member of the Bloemfontein Bar Council, she consulted Maree in the late afternoon of 25 June 2003. She mandated him to lodge her claim against the RAF and pursue it to its finality. It was common cause that Maree was an expert on RAF matters. Plaintiff related to

Maree what had happened and Maree also asked questions and kept notes during the consultation. Some documents pertaining to the accident and personal details were handed over to Maree. The consultation lasted an hour or more. Of significance is that plaintiff also gave Maree her UK e-mail address to communicate with her whenever necessary. It was common cause that she recorded her e-mail address in her own hand on the file cover of her personal file. Plaintiff says that there was an understanding between the three of them that her father would be *“the point of contact from a logistical point of view.”* She could not recall if she signed a power of attorney or any other document that afternoon. Whilst she was in the UK, at some point, her father contacted her to obtain some medical information required by Maree. She furnished the information.

- [8] It was further common cause that since she instructed Maree on 25 June 2003 he did not communicate with her on developments on her matter either in person, telephonically or electronically. It was also common cause that plaintiff was a lay person and placed her faith in Maree to guide and advice

her on what to do, what documents to complete and sign and where and when her claim had to be lodged as prescribed by the relevant laws and rules.

[10] Maree testified that he is a director in the defendant firm and an admitted attorney of the High Court since 1976. He has been dealing with personal injury and road accident civil litigation for the best part of his professional career. He confirmed plaintiff's evidence in all material respects except that he claimed that he had no independent recollection that the plaintiff was present during the consultation but maintained that he was prepared to acknowledge that she was indeed present. Maree further maintained that during the consultation the parties agreed that Heymans be appointed the plaintiff's agent.

[10] By 30 June 2003, so Maree testified, he had also received the statutory medical report from Dr Van Niekerk and another by Dr Westmore relating to their consultations with the plaintiff, their diagnoses of her injuries and the medical treatment she received. Maree conceded that in five days from the day he

was instructed (25 June 2003), he had all the prescribed documents necessary to lodge the claim with RAF. During cross-examination he identified the documents he was provided with during consultation as (a) the computation of the *quantum* compiled by Heymans; (b) the sworn declaration by Mr Jean du Plessis, an eye witness in the accident; (c) plaintiff's identity document; and (d) photos which depicted plaintiff's injuries. This evidential material served as exhibits in this trial.

[11] According to Maree there was only one consultation with plaintiff and her father (Heymans) and that subsequent to this one and only consultation he sent an MMF1 form to Heymans in order for him to sign it as plaintiff's agent. He requested Heymans to provide him with the signed power of attorney which he furnished him with. Maree maintained that the MMF1 claim form was hand-delivered. The letter dated 8 October 2003 was produced by Maree as an exhibit. He says that Heymans did not react to this letter.

[12] Maree testified that on 10 November 2003 he wrote a letter to

Heymans in which he requested him to return the signed MMF1 form and the power of attorney as a matter of urgency. That on 21 January 2004 he once more wrote to Heymans stating that: *“Dit is werklik noodsaaklik dat ons die eis by die fonds ingedien kry deurdat verjaring ‘n faktor begin word. Ek verneem dus graag dringend van jou”* as the claim would prescribe in 2004, counting from the date of the accident. However no prescription date or even the year appears in the cited letters.

- [13] An entry dated 29 April 2004, thus three months before the claim was due to prescribe, was made by Maree on plaintiff's file that he spoke to Heymans telephonically and informed him that the claim is in danger of prescribing. He says Heymans undertook to sign the claim form that very week. On 21 June 2004 Heymans phoned his office in his absence and left a message. He returned the call later that day. Heymans once more undertook to sign the form. On 28 June 2004, a month before the claim was due to prescribe, he made a note after talking to Heymans which note reads: *“Bel Paul, ek deel mee dat hy werklik nou ‘n plan moet maak om te teken. Vra of ek ‘n klerk kan stuur. Hy sal bel, wil eisdokument/MMF1 nagaan.”*

According to Maree Heymans did not return the claim form or return the power of attorney as promised. That was the last time the two ever communicated.

[14] Maree corroborates plaintiff's version that she sent him an email to enquire about her claim as she had been informed by an independent source that her claim had prescribed. It was only then upon enquiry via email that plaintiff learned first hand from Maree of the prescription of her claim.

[15] Emanating from the diametrically opposed versions of the parties on some aspects the following issues need to be resolved:

15.1 Whether plaintiff appointed her father as her agent and consequently that Heymans would provide Maree with all the necessary information to process and file the claim with due diligence and circumspection. If this issue is decided in favour of the defendant that would be the end of the matter and plaintiff's action must be dismissed with costs;

15.2 Whether Maree was obliged to communicate with the plaintiff as the principal, more so in that Maree alleges that Heymans failed or refused to provide him with the information or documents requested knowing fully well that plaintiff, and not Heymans, was their client, that her interests needed to be protected, that they owed her a duty of care;

15.3 Whether what Maree did until 28 June 2004 was sufficient to protect plaintiff's interests and to defeat plaintiff's claim against Schoeman Maree Inc.

Was the relationship between plaintiff and defendant one of contract or delict?

[16] It is common cause that the relationship between plaintiff and respondent, that of attorney and client, falls within the purview of an agent and principal. This relationship is defined and regulated in terms of our common law of agency as derived from English law. See **De Villiers & Macintosh, The Law of Agency in South Africa 3rd ed; Gibson, South African Mercantile Law and Company Law ...ed .** See too **Mason v Vacuum Oil Co of SA (Pty) Ltd** 1936 CPD 219 at 223.

An agent is defined by **De Villiers & Macintosh** in Article I p8 as *“a person who has authority to act for and on behalf of another (called the principal) in contracting legal relations with third parties, the agent represents the principal and creates, alters or discharges legal obligations of a contractual nature between the principal and third parties.”*

From this definition three things are evident. First, the relationship is contractual. Secondly, the contract is between the principal and the agent. Thirdly, the agency relates to the principal's contractual relations with third parties.

- [17] **De Villiers & Macintosh** at p 120 under Article 13 maintain that two or more persons may be appointed as agents by one principal. If it be intended that all of them should act in concert in carrying out the mandate their authority becomes joint. In that event only by way of their joint action can they bind the principal. They are liable *in solidum* for the due execution of the authority, the one paying the other to be absolved.

[18] The court in **Goodriche & Son v Auto Protection Insurance Company (Pty) Ltd** 1967 (2) SA 501 (W) at 503G-H states:

“The services an attorney renders to his client are mainly...those which an agent renders to his principal. Although the relationship between an attorney and his client is of a very special character with certain aspects peculiar to itself, the legal principles which apply to that relationship are those of the law of agency...”

On the basis of these principles I am of the view that the relationship between plaintiff and defendant was of an agent and principal and therefore contractual.

Did plaintiff appoint Heymans as her agent?

[19] The plaintiff was emphatic that she never appointed or intended to appoint her father, Heymans, as her agent. She merely supplied Maree with all the necessary information as well as her e-mail address to be contacted whenever necessary. Her understanding that she had was that her father, because of the proximity will be the contact person or the mail box but this was never meant to eliminate her from the process. During cross-examination she maintained the same

view when it was put to her that "...if an attorney asks for facts and instructions and information and that is not given, the attorney cannot lodge the claim, do you agree? --- It is for the very reason that before I left that night, I made sure that Mr Maree had a very good way of communicating with me and that is my email address because I check that on a daily basis. Because I specifically said to Mr Maree it is very important that we must be able to communicate should he wish to get further information from me. I offered to give him my email address."

Further on the following was put to her: "Let me put this to you for your comment. Mr Maree communicated on numerous occasions with the person whom you had nominated to provide information regarding your claim whilst you were in the United Kingdom and that person did not provide the information.--- At that consultation Mr Maree and my father agreed that from a logistical point of view, because I am not physically ... here in South Africa ,it is useful to have a point of contact. At no point was my father going to do everything on my behalf."

- [20] In its plea the defendant initially denied all the allegations made against it including the fact that the collision was due to the sole negligent driving of the soldier who drove the insured vehicle. The defendant nevertheless pleaded that "it was further an implied or alternatively tacit term of the mandate that the defendant would exercise due care and diligence, and not act negligently in

performing its mandate. Further that it was an implied, alternatively tacit term of the mandate that the defendant would only be liable to the plaintiff for breach of mandate if it did not exercise due care and diligence, and acted negligently in the performance of its mandate.” In its amended plea at para 6 defendant pleaded that ‘in amplification ... the defendant pleads that it exercised due care and diligence, and denies that it acted negligently in the performance of the mandate.”

- [21] It is noteworthy that the defendant shifted wholesale ground when the trial was due to commence when, through the backdoor, its main case and defence shield became one of agency. In its plea defendant did not raise the issue or the defence of agency. This issue only came to light in response to the list of the pre-trial enquiries in terms of rule 37(4), and later during cross-examination by defendant’s counsel of the plaintiff. Maree claimed that it was on the strength of Heyman’s appointment as agent that he communicated from the onset and at all times with him. He maintains that when Heymans failed to sign the prescribed MMF1 form and provide him with the power of attorney he stopped communicating with him on 28 June 2004 and the claim prescribed as a result.

[22] It is not in dispute that the defendant had all the crucial information necessary to file the claim with the RAF. Nor is it in dispute that had the claim been filed with the RAF timeously it would have been in substantial compliance with the regulations even if it was not signed. In **SA Eagle Insurance Co Ltd v Pretorius** 1998(2) SA 656 (SCA) at 663A-D the Supreme Court of Appeal pronounced that:

“Notwithstanding the wording of art 62(d)(i) and the corresponding wording of its predecessors, in a long line of decisions in this and other Courts pre- and post-1978 it has been held that (1) the submission of a claim form is a peremptory requirement; (2) the prescribed requirements in regard to the completion of the form are directory; and (3) what is required is substantial compliance with such requirements. (See Rondalia Versekeringskorporasie van Suid-Afrika Bpk v Lemmer 1966 (2) SA 245 (A) ; Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) , particularly at 435F--436E; AA Mutual Insurance Association Ltd v Gcanga 1980 (1) SA 858 (A) at 865B-F; Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 831B-F and Guardian National Insurance Co Ltd v Van der Westhuizen 1990 (2) SA 204 (C) , where the relevant principles are conveniently and concisely set out at 210B-211F, and

Moskovitz v Commercial Union Assurance Co of SA Ltd 1992 (4) SA 192 (W)). In Nkisimane's case supra at 436E-F, Trollip JA doubted that it was ever the intention that a defectively completed form could be relied upon as an additional defence to a claim for compensation."

The court went on to say at 663E:

"It also appears from the authorities to which I have referred that the test for substantial compliance is an objective one (AA Mutual Insurance Association Ltd v Gcanga (supra at 865H)). Broadly speaking, the question must be posed whether sufficient particularity has been furnished to enable a reasonable insurer to consider its position in relation to the claim before it becomes involved in litigation, and to enable it to investigate the claim, if necessary. Differently put, would a reasonable insurer have been prevented by any omission or inaccuracy in the claim form from properly investigating the claim and determining its attitude towards it?"(My underlining)

From these authorities it is clear that an apparent failure to sign an MFF1 form which was duly and properly completed in all respect such as in the present matter is considered to be in

substantial compliance with the regulations of the Act. See **Mogape v Netherlands Insurance Co of South Africa Ltd** 1978 (4) SA 609 (W) at 613 and cases quoted therein. The position that the defendant is adopting is contradictory. It blows hot and cold. Maree says he is unable to recall whether plaintiff was present at the one and only consultation on 25 June 2003 at which he received his mandate to represent the plaintiff and instructions to recover damages from the RAF. In an effort to convince the court that he did not remember her presence he states that he was prepared to accept that she must have been present during the consultation. The contradiction lies in the fact that he claims a vivid memory that plaintiff appointed her father, Heymans, as agent because this could only have happened *inter partes*. It should be borne in mind that Heymans' appointment could not have been made telephonically, by post or via email because it was common cause that plaintiff and Maree had never directly communicated with each other after 25 June 2003 (the consultation date). I can hardly envisage that Maree, with his knowledge of and expertise in RAF matters, the ethical rules, the laws and regulations pertaining to an attorney's practice,

would deal with plaintiff's matter by proxy and remote control as he suggests in his defence.

[24] In my view the belated agency defence is an afterthought and a fabrication. That is why agency was not even pleaded. There is no doubt that plaintiff was present with her father during consultation as the objective evidence shows. I refer *inter alia* to the documentation furnished to Maree during consultation and the fact that plaintiff recorded her forwarding address (the email address) on the cover of her file that remained in the custody of the defendant throughout. Maree's play to shift all or most of the blame and responsibility to plaintiff's father who did not owe the plaintiff a duty of care, is unconvincing and hollow.

[25] It is important to note that after plaintiff had issued summons against the defendant Maree wrote to plaintiff's father, Heymans, that Schoeman Maree Inc are jointly liable for the damages suffered by the plaintiff and urged him, in terms of the Apportionment of Damages Act No 34 of 1956 to join as a party or risk being joined upon his failure or being sued should

plaintiff's action succeed. Tellingly Maree wrote:

“Te alle tersaaklike tye het u teenoor skrywer vermeld dat u ‘n algemene volmag het om die eis dokumente namens en ten behoeve van u dogter te onderteken. Die eisvorm is aan u gelewer vir ondertekening en ondanks verskeie aanmanings daartoe en ‘n waarskuwing dat u dogter se eis die potensiaal het om te verjaar, het u nagelaat om die ondertekende dokumente aan ons te lewer.”

The letter does not say Maree knows as a fact that during consultation on 25 June 2003 plaintiff appointed Heymans as agent, but says that Heymans at all material times represented that he has a general power of attorney from his daughter to do what his daughter should have done.

[26] I am satisfied that plaintiff was an honest witness and gave credible evidence. I am satisfied that Maree was less than frank on a number of material aspects in this case. Where he came up with a probable explanation, most of the time extracted under cross-examination, such concession to a large extent corroborated the version of the plaintiff. On a conspectus of the entire evidence I have no doubt that the

evidence of the plaintiff must be preferred to that of Maree where conflicts in their evidence appear.

- [27] An attorney who undertakes a mandate, whether it be gratuitous or not is considered to hold himself out as possessing the necessary skills to discharge such mandate diligently and is liable for damages occasioned by his or her negligence in the discharge of the duties emanating from such trust. See **De Villiers & Macintosh** at 326. In carrying out his mandate the defendant was personally or through others, expected to exercise the knowledge, skill and diligence to be expected of an average practising attorney. See **Slomowitz v Kok** 1983(1) SA 130 (A) at 132; **Mouton v Die Mynwerkersunie** 1977 (1) SA 119 (A) at 142 – 143.
- [28] A prudent attorney acting carefully, particularly one of Maree's professed skill and expertise would at the least have put Heymans on terms to perform his alleged obligation or part of his bargain by a specified date. The last conversation that Maree had with Heymans was on 28 June 2004. The red lights were flickering because plaintiff's claim was due to prescribe in

less than a month's time on 24 July 2004. Maree did nothing more and the claim became prescribed. Having regards to what was at stake Maree had negligently allowed the claim to prescribe. His conduct cannot be excused. It amounted to dereliction of duties and a breach of his mandate. If necessary he should have walked across to the advocates' chambers, which was in close proximity, during the final month or even a few days or a day before the claim lapsed for advice or else he should have filed the claim without the MMF1 form having been signed. In our law it would have been substantial compliance with the regulations. As I have pointed out I doubt very much that Maree, the RAF expert, was unaware of some of the cited authorities. He could even have sought a senior colleague or an advocate's opinion. In my view this was not even necessary as there was nothing complicated about lodging the claim timeously.

[29] It was submitted on behalf of the defendant that:

“It is completely untenable to expect an attorney to engage in any activity that is unlawful, that is upon suggestion of plaintiff that

Maree should have taken a chance and signed the MMF1 form in an effort to protect plaintiff (to prosecute his client's claim)."

I agree with Colman J who said in **Mazibuko v Singer** 1979 (3) SA 258 (W) at 264 – 265 that: "...the far greater evil was to allow the plaintiff's claim, which was manifestly of enormous importance to him to become prescribed."

[30] I am satisfied that no attorney of ordinary competence and diligence, let alone one of more than 20 years experience in this type of matters, would have allowed this claim to become prescribed. It was open to the defendant to withdraw from the case for lack of instruction or proper instructions. However, such option had to be exercised timeously and in terms of the rules of court to ensure not only that the Notice of Withdrawal reach the client but also to allow her time to engage another attorney to prosecute her claim. See Rule 16(4). This was not done. I consequently hold that there was a breach of contract or mandate entitling plaintiff to recover damages from the defendant.

[31] There is no reason why the costs should not follow the results.

[32] In the circumstances I make the following order:

ORDER:

- 1. Judgment is granted against the defendant in respect of plaintiff's damages to be determined.**
- 2. Defendant is ordered to pay the plaintiff's costs of this trial.**

B. C. MOCUMIE, J

On behalf of the plaintiff:

Mr. K M Röntgen (Snr)
Instructed by:
Lovius – Block
BLOEMFONTEIN

On behalf of the defendant:

Advocate Green
Instructed by:
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