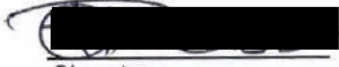




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 83874/2015

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
20/1/2025	
Date	Signature

In the matter between:

MATSIELE AGNES MOKALAPA

Plaintiff

and

RAMUSHU MASHILE TWALA INC.

Defendant

JUDGMENT

BASSON, J

[1] In this matter, the plaintiff (Ms. Agnes Matsiele Mokalapa) seeks an order for damages from the defendant – a firm of attorneys (Ramushu, Mashile Twala Inc) arising from an alleged breach of duty by the aforesaid attorneys, acting on her behalf in her claim against the Road Accident Fund (“RAF”).

[2] On 28 June 2005, the plaintiff was a passenger in a vehicle when it was involved in an accident with another vehicle. The plaintiff claims that as a result of the accident, she sustained serious injuries. It is common cause that the defendant accepted instructions to represent her in her claim against the RAF and duly instituted a claim against the RAF for damages in the amount of R517 076.00. At all material times, the plaintiff was represented by Mr. Ramushu (“Ramushu” or the “defendant”) in pursuing her claim against the RAF.

Issues before the court

[3] There are two main issues before this Court. The first is whether the defendant breached the mandate given to it by the plaintiff in pursuing her RAF claim, which was ultimately settled. I will refer to this as the “*merits*” part of this action. The second issue in this matter pertains to the special plea of prescription (referred to as the “*prescription*” part of the claim). It is common cause that the plaintiff bears the onus in respect of the “*merits*” part of the claim.¹ In respect of the prescription issue, the defendant bears the onus of proof. The facts pertaining to both questions are intertwined and will be discussed together, after which a conclusion will be drawn. By agreement, the defendant commenced leading evidence. The merits and quantum have also been separated by agreement.

[4] It was common cause that the RAF claim was under-settled. Counsel on behalf of the defendant placed on record that it was agreed upon between the parties that should this Court find that the plaintiff knew that the RAF claim was under-settled at the time when the settlement offer was signed, the claim would have prescribed.

The merits part of the claim

[5] It is trite that a plaintiff must set out her claim and define the issues for her claim in her pleadings. A court is then required to “*adjudicate upon the disputes and those*

¹ *Pillay v Krishna and another* 1946 AD 946 ad 952.

alone”.² Regarding the purpose of pleadings, the court in *Minister of Safety and Security v Slabbert*³ stated as follows:

“A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

[6] Turning to the pleadings in the present matter:

“16.1 On 15 October 2011 and at Ga-Masemola, Limpopo Province, Mr Melatong Ramushu representing the Defendant wrongfully and/or negligently advised and/or made the Plaintiff to accept as offer of a settlement from the Road Accident Fund in the amount of R218 775.90 in respect of her claim referred to herein above.

16.3

16.3.1 The advice of Mr Melatong Ramushu who was duly representing the Defendant, the Plaintiff accepted the said offer by signing it.

16.3.2 The said offer of settlement referred to above was not a fair just and adequate compensation, regard being had to the nature, extent and sequelae of the injuries sustained by the plaintiff in the collision referred to above.”

16.4 Mr Melatong Ramushu, who was duly representing the defendant, when by the exercise of reasonable care, skill and diligence, could not and should not have advised the plaintiff to accept the offer, in that:

16.4.1 The amount of R100 00.00 for general damages is inadequate in relation to the injuries sustained by the Plaintiff in the aforesaid collision.

16.4.2 the amount of R111 275.90 for loss of earnings is inadequate in the circumstances, Mr Melatong Ramushu having failed to thoroughly investigate and prepare the Plaintiff’s claim for past and future income or earning capacity

² *Molusi and others v Foges NO and others* 2016 (3) SA 370 (CC) at para 28.

³ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11.

suffered by the plaintiff by inter alia appointing the Occupational Therapist and Industrial Psychologist to assess and comment in Medico- Legal Reports on the plaintiff's loss of income or earning capacity."

[7] On a plain reading of the pleadings, it appears that the main features of the plaintiff's claim are the following:

- (i) Ramushu wrongfully and/or negligently advised the plaintiff to accept the RAF settlement offer.
- (ii) The plaintiff acting on this advice accepted the settlement offer. From the pleadings it appears that the plaintiff also claims in the alternative a measure of coercion in that Ramushu "*made the plaintiff to accept*" the settlement offer.
- (iii) Ramushu should not have advised the plaintiff to accept the settlement offer as it was not a just and adequate compensation.
- (iv) Ramushu should have appointed further experts to assess the plaintiff and comment on her loss of income or earning capacity.
- (v) The claim was under-settled.

[8] It is common cause that the claim against the RAF was settled on 15 October 2011 for an amount of R 218 775.90, when the plaintiff signed a written acceptance of an offer of settlement from the RAF. At the time when the plaintiff accepted the offer of settlement, only one medico-legal report had been obtained from an orthopedic surgeon, Dr Moloto.

[9] The plaintiff claims that Ramushu advised her (and/or made her) to sign the offer. This is disputed by Ramushu who pleaded that he had advised the plaintiff to undergo further medical assessments as that may have led to a better settlement. He advised her that relying only on Dr. Moloto's report was insufficient and that she had to undergo further assessments. According to Ramushu, the plaintiff refused and insisted on accepting the settlement amount offered by the RAF. The defendant, therefore, pleads that the plaintiff is entirely at fault for the under-settlement of her claim and that she had disregarded his advice to undergo further assessment. Ramushu also claims that the plaintiff was fully aware of the fact that the amount was insufficient but that she had, nonetheless, decided to accept the settlement offer.

[10] The central factual disputes between the parties pertain to firstly, the circumstances under which the plaintiff signed the offer of settlement and, secondly, whether the defendant

acted negligently in not obtaining further medico-legal reports. The parties' respective versions of these two issues are diametrically different and irreconcilable. But, having said so, and, bearing in mind that the plaintiff bears the onus to prove the breach of mandate, this matter can be decided on the probabilities and having regard to the contemporaneous documents (which are not in dispute). The court in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell & Cie SA and Others*⁴ explains how irreconcilable versions should be resolved:

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and d in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[11] Apart from the fact that the plaintiff's evidence contradicts her own pleaded case, the

⁴ 2003 (1) SA 11 (SCA) at para 5.

probabilities favour the defendant. I should also add that the plaintiff was a poor witness: She was evasive; there were significant inconsistencies in her evidence, and at times, her evidence was simply untruthful. I will refer to some examples below.

Merits conceded: First postponement of the trial

[12] On 30 April 2010, merits were conceded, and a court order to that effect was made. The quantum trial was also postponed on that day (the first postponement). Ramushu testified that the separation occurred so that the quantum portion could be properly assessed and tried. He also referred the court to a memorandum written by the plaintiff's counsel in the RAF trial. In this memorandum Adv. Leopeng furnished Ramushu with names of experts who would have been able to assess the plaintiff and produce further medico-legal reports. Adv. Leopeng records in this memorandum that he was providing the names "*as requested*" by Ramushu.

[13] Ramushu testified that when he put forward settlement proposals to the RAF's attorneys, the RAF served a notice in terms of Rule 35(3) calling for the plaintiff's payslips. On 3 August 2011, Ramushu responded that the plaintiff's Employers' Certificate would have to suffice because the plaintiff was a domestic worker and not in possession of payslips. On 11 August 2011, the RAF responded that "*no sufficient expertise reports*" were filed to prove the heads of damages. In that letter Chauke requested that an occupational therapist and an industrial psychologist should be appointed to enable an actuary to calculate the plaintiff's loss. It was then that Ramushu requested Adv. Leopeng to furnish him with names of further experts.

Advice to undergo further medical assessment

[14] A crucial dispute in this matter is whether Ramushu advised the plaintiff to undergo further assessments as that would have enhanced her chances of securing a better settlement. The plaintiff disputes that she was ever advised to undergo further assessments even though it was not disputed that on 5 August 2011 Ramushu dispatched a letter to the plaintiff informing her that she needed to be assessed by an occupational therapist and an industrial psychologist. The certificate of value obtained from Dr. Robert Koch was also attached to the letter. The plaintiff was also informed in this letter that her quantum trial would be removed from the roll in the circumstances.

[15] Ramushu testified that he followed this letter up with a conversation with the plaintiff because he knew that she was unsophisticated. He testified that he informed her that she had to be assessed because a court may refuse to award her compensation only on the strength of the orthopedic surgeon's report. He also informed her that she would have to come to Pretoria to be assessed. The plaintiff, however, refused to adhere to Ramushu's request. According to Ramushu, the plaintiff's son (who also gave evidence to confirm her version) was also involved in the conversation. Ramushu testified that the plaintiff told him that she was "*fine*" and that she did not need to go for further assessments.

[16] Ramushu addressed a letter to the RAF to remove the plaintiff's quantum trial from the roll. In that letter, Ramushu also enquired from the RAF's attorney whether the RAF intended to enlist the services of an occupational therapist and an industrial psychologist. This was the second time that the matter was removed from the roll with a view of obtaining further expert reports.

[17] I have already referred to the fact that it was not in dispute that Ramushu had sent the plaintiff the letter advising her to go for further assessments. The plaintiff, however, initially pleaded ignorance about the letter but later admitted that her children (who could read) had collected the letter from the postbox. Then she testified that the letter was received and that two of her children cooperated to tell her what the contents were, but they told her that it merely pertained to her employers' certificate and not that she had to undergo further medical assessments. None of this is contained in the letter in question and there is no logical reason why her children, who could read and write and were thus literate, would have read something into the letter that is simply not there. It was only when it was put to her that it was never disputed with Ramushu in cross-examination that she did not receive the letter, that the plaintiff reluctantly admitted she did receive the letter. She blamed this confusion on the fact that she had a head injury and could not hear properly. This version was also never put to Ramushu.

[18] But, even if the plaintiff's version is accepted that she did not know that the letter had advised her to go for medical treatment, the probabilities, in my view, favour Ramushu's evidence that he had followed the letter up with a conversation with the plaintiff. He knew, and it was also so conveyed to the plaintiff, that further assessments could lead to a higher settlement. I can find no reason to doubt the defendant's evidence in this regard.

[19] Although the plaintiff will have this Court believe that Ramushu did nothing, she was unable to explain away Adv. Leopeng's memorandum that suggested names of further experts, the letter from Chauke, the letter from Ramushu to Chauke, and the fact that the quantum trial was postponed twice, all of which support the probabilities in favour of the defendant.

[20] I also find it highly improbable that Ramushu would not have followed up with the plaintiff about the need to undergo further medical assessments. The plaintiff, on the other hand, has proven herself to be less than truthful about the request for further medical assessments. She contradicted herself by seeking to retract her evidence that she had received the letter informing her that she had to undergo further medical assessments. I also can find no cogent reason, nor was any suggested to Ramushu during cross-examination, as to why Ramushu would not inform her nor follow it up that she had to be assessed by an industrial psychologist and an occupational therapist.

[21] The plaintiff also persisted with her version in cross-examination that Ramushu never visited her and could not explain why Ramushu would not visit her in light of the fact that his parents lived near her. She could also not explain why Ramushu's evidence that he had visited the plaintiff more than once was not challenged. Her answer to what was put to her was that she had an "*infestation of blood in her head*" and that she could not hear properly. She also said that the reason why Ramushu's evidence was not challenged was because of her head injury and that she could not think "*straight*".

[22] In conclusion therefore, the plaintiff was advised to undergo further assessments because such assessments may have lead to a higher settlement, but she refused to go. I also have no reason to doubt the evidence that the plaintiff informed Ramushu that she was well and, therefore, did not want to go to Pretoria for further assessments as it would take too long.

Discovered documents

[23] Before turning to the dispute as to what happened on the day of the signing of the offer to settle, it is necessary to deal briefly with the status of the discovered documents that were handed in at the commencement of the trial. These included correspondence from

Ramushu to the plaintiff, as well as communications between the defendant and the RAF. Additionally, the bundle also contains a memorandum in which Ramushu was furnished (as already mentioned) with names of experts who could be consulted for further medico-legal assessments. What is important is the fact that none of these documents were placed in dispute by the plaintiff during Ramushu's cross-examination. Particularly, it was never put to him that any of the letters addressed to the plaintiff were not received by her. It was also not disputed in Ramushu's cross-examination that these documents were *bona fide* and that they were not contemporaneously produced.

[24] Failure to contest evidence or documents in cross-examination may lead to the assumption that the documents (such as letters) and the evidence regarding the contents thereof are accepted as correct. The Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* explains:⁵

"The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts."

What happened on the day the settlement offer was signed?

[25] On 13 October 2011, Ramushu wrote to the plaintiff advising her that the RAF had made a settlement offer in the amount of R218 775.90. In that letter, Ramushu records that he was awaiting her further instructions. Although Ramushu conveyed the offer to the plaintiff in this letter, he made no recommendations as to whether she should accept or reject the settlement offer. On the same date Ramushu informed the chief executive officer of the RAF in a letter that the settlement offer was conveyed to the plaintiff and that instructions were awaited from the plaintiff regarding the RAF's offer. Two days after Ramushu had conveyed

⁵ 2000 (1) SA 1 (CC) at para 61.

the settlement offer to the plaintiff, the settlement offer was signed by the plaintiff. On the same date, Ramushu sent the signed offer to the chief executive officer of the RAF.

[26] Returning to the events of 15 October 2011. Having regard to the pleadings, two versions were placed before court as to what had transpired on the day of the signing of the RAF settlement offer. They are different in virtually every material aspect. And then there is the *new* version that emerged during cross-examination of the plaintiff which differs in all material respects from her pleaded case and a version that was not put to Ramushu in cross-examination.

[27] The plaintiff's version, as set out in her pleadings, is that Ramushu had advised her (alternatively, made her) to sign the offer. This was also the version that was put to Ramushu during cross-examination which he denied. It was specifically put to him that the plaintiff would testify that when Ramushu discussed the offer with her, he "*encouraged*" her to sign it and indicated to her that if she did not sign the offer, the money would be forfeited to the State. The defendant's version on the pleadings (as already stated) is that he had advised her to undergo further medical assessments to secure a higher settlement but that she had refused to undergo further assessment and insisted on signing the settlement offer.

[28] During cross-examination, the plaintiff came up with a different version, which is contrary to what she had specifically pleaded. The plaintiff testified that Ramushu told her only *after* she had signed the settlement offer that had she not accepted the offer, the money would have reverted to the State. She confirmed this version at least three times in cross-examination. On her own evidence, the plaintiff has therefore failed to prove that the defendant had advised her to sign. I will revert to whether she knew that the claim was an under settlement.

Did Ramushu inform the plaintiff what the settlement amount was?

[29] The plaintiff testified that she did not know for how much the settlement offer was and that Ramushu did not tell her. Firstly, it is highly unlikely that Ramushu would not have informed the plaintiff what the settlement amount was when she signed the offer. Secondly, she was informed in a letter what the amount was, the amount that appeared on the settlement offer, and that was the amount that was paid into her bank account.

[30] Although I am mindful of the fact that the plaintiff is illiterate, I am nonetheless not persuaded that Ramushu would simply tell the plaintiff on the day she signed the RAF's offer without explaining to her what the amount was where she had to sign. The plaintiff had long been awaiting her money, and the fact that there eventually was an offer on the table must have meant everything to her, taking into account the extremely impecunious circumstances that she and her family had been experiencing since she, as the sole breadwinner, had stopped working. When confronted with the improbability of her version in this regard the Plaintiff reverted to an answer which she repeatedly gave every time an improbability was put to her, namely that it was for Ramushu to do certain things.

[31] The witness also testified that she was unaware that the funds received were intended to provide lifelong support. According to her the State had to look after her. She testified that she was surprised when she ran out of money.

[32] Ramushu testified that the plaintiff was very excited when she heard how much money she would receive and that she was eager to accept the settlement offer. Ramushu testified that she told him that she *"did not want to die before eating my money"*. She also told him that she did not want to undergo further assessment because it would take too long and also told him that she was not experiencing any health or injury-related problems. When asked if she knew that the money that was paid to her was not enough, she replied, *"No. I did not know anything"*.

Assessment by Dr Moloto

[33] The plaintiff's evidence regarding her assessment by Dr. Moloto further underscores the conclusion that she was a less-than-truthful witness. Even though Dr. Moloto refers in his report to the plaintiff's current complaints, she testified that Dr. Moloto did not ask her about any current problems, nor did she tell him about her head injury. Her explanation was that it was not her place to say anything.

[34] But then she testified that Dr Moloto had informed her that she had serious injuries to her head and that had caused her not to see or hear properly. Although Dr. Moloto refers to lacerations on her head, the report does not record that she had suffered a head injury, nor does he refer her to a neurosurgeon for further assessment. The X-ray report also does not mention a head injury. It only records that she suffered from arthritis in her right hand. He

concludes by saying that the plaintiff had sustained a severe injury to her right hand, which resulted in deformities and a marked decrease of function in her right hand.

Where did the money go?

[35] It is common cause that the entire settlement amount was depleted in less than a year. When asked what she used the money for, she testified that she used it to visit private doctors to manage her medical problems. When it was put to her that it was improbable that she could spend such an amount within less than a year, she responded that it was because of her severe head injury that she had to pay doctors.

[36] When asked what medical treatment she spent the money on, she admitted that she did not undergo an operation, but that she had spent the amount on tablets and bandages. When pressed on how she could have spent R158 000.00 on pills and bandages in one year, she responded that doctors are expensive. She was, however, not forthcoming on which doctors she consulted.

[37] It was put to her that her version was improbable because the RAF had furnished her with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act.⁶ She denied that she knew that she could receive further medical treatment from a State hospital in terms of the undertaking. According to her, the hospital told her after her discharge that the hospital had *"no further business with her"*.

[38] I am not persuaded that the plaintiff is being honest in her evidence that she had spent about R158 000.00 in less than a year on pills, bandages, and visits to private doctors. Also, the plaintiff was initially treated in a State hospital. She was mostly unemployed (and therefore, in any event, eligible to attend a state hospital), and she had been furnished with an undertaking. The plaintiff was also not forthcoming about which doctors she consulted and how it was possible to spend that amount of money on pills and bandages. I am in agreement with the submission that the point of the plaintiff's improbable insistence that she never knew how much she got from the RAF is to avoid having to explain why she did not complain that the amount she received was too little. The plaintiff's evidence is, therefore, not only improbable but also does not make logical sense. Despite her professed laments about her purported ill health,

⁶ Act 56 of 1996.

she never attempted to contact Ramushu to assist her and her attempts to explain why she failed to do so when Ramushu's brother lives next door and Ramushu's parents live in the vicinity. Moreover, she had Ramushu's particulars (they are printed on the letter she admits she received) and her son was given Ramushu's telephone number.

The document allegedly signed by the plaintiff's daughter

[39] In a somewhat bizarre turn of events, the plaintiff testified that Ramushu had told her 14-year-old daughter to sign a certain document in pencil. This is denied by Ramushu. This evidence is, in my view, a red herring. The plaintiff could not explain what document was signed, and no such document was discovered. This evidence makes no sense particularly in light of the fact that the document allegedly signed served no purpose (and was in any event not before Court).

Consultation with her legal representatives

[40] The plaintiff also had no qualms about throwing her legal representatives under the bus by claiming that they did not consult with her on anything and only talked to her about going to court. If this was so, which I do not accept, that would mean that her legal representatives were remiss in their duty to consult with her in preparation for trial. It is also highly unlikely that her legal representatives would not have discussed Ramushu's defense with her and more in particular the fact that Ramushu had advised her to undergo further medical assessments in order to secure a better compensation, but that she had refused to do so and would merely have discussed with her that she had to come to court. This evidence is not only improbable but, in my view, also untruthful.

[41] In conclusion, I am in agreement – apart from the fact that the probabilities favour the defendant's version - that when the evidence of Ramushu and the evidence of the plaintiff are compared with one another, there are simply no grounds upon which it can ever be found that the plaintiff's version is true and that of Ramushu is false. Thus, the plaintiff's claim must also fail on the credibility approach.

[42] The plaintiff was therefore advised by Ramushu to undergo further medical assessment as that may have resulted in a better settlement. She refused and insisted that the claim be settled because she wanted to "eat her money" before she died. I am further persuaded that she also knew that the RAF offer amounted to an under-settlement of her

claim but that she had elected to accept the amount as she was not willing to wait any longer for her money. Lastly and crucially, Ramushu did not advise her or “made” her sign the settlement offer. I am also not persuaded on the probabilities that he would have told her that the money would revert back to the State if she had not signed the offer. In the event, the merits part of the claim stands to be dismissed.

Prescription

[43] Turning to the question of prescription, which is interlinked with the merits part of the claim. In the defendant’s plea of prescription, the allegations made in the particulars of claim are mostly paraphrased. Of importance is the claim that damages were incurred on 19 October 2011 and that the plaintiff issued summons against the defendant on 19 October 2015, which is four years after the plaintiff filed the notice of offer and acceptance of the settlement with the RAF. The defendant, therefore, raised a special plea of prescription to the plaintiff’s particulars of claim, pleading that the plaintiff’s claim against it has been extinguished by prescription in terms of section 11 of the Prescription Act.⁷

[44] The Constitutional Court recently, in *Le Roux and Another v Johannes G Coetzee and Seuns and Another*⁸ created a limited exception to the general rule that legal conclusions do not constitute facts and consequently when it comes to determining whether or not a plaintiff had knowledge of the necessary facts in order for prescription to commence running against the plaintiff, ignorance of such legal conclusions is irrelevant:

“In such instances a limited exception to the rule is necessary and appropriate. The exception being: for the purposes of s. 12(3) of the Prescription Act, in professional negligence claims against the legal practitioners, the facts from which the debt arises **may** include a legal conclusion, where that legal conclusion forms part of the cause of action or minimum facts in order to pursue the claim.”⁹

The Court further observed that:

“At the time the incorrect advice is given, or a mandate is purportedly discharged, the client would generally not know that the advice was incorrect or that the mandate

⁷ Act 68 of 1996.

⁸ 2024 (4) SA 1 (CC).

⁹ *Ibid* at para 79.

was not properly discharged. Either may have occurred as a matter of fact. Yet the knowledge and appreciation that the advice was incorrect or that the mandate was not properly discharged may only emerge much later.”¹⁰

The *ratio* given by the Constitutional Court for merely a limited exception is the following:

“That it is a limited exception is important for a number of reasons. It would not apply in all cases of professional negligence involving legal practitioners but only in those where a legal conclusion is necessary to establish that incorrect advice was given, or the mandate was not properly discharged.”¹¹

[45] On Ramushu’s evidence, which I accept as not only probable but also credible, the plaintiff was aware that the offer was inadequate but that she had refused to undergo further medical assessments which may have resulted in a higher settlement amount. In this scenario, the plaintiff, therefore, already knew on 15 October 2011 that her claim was under-settled.

[46] But more importantly, the plaintiff has failed to prove that Ramushu gave her incorrect advice. The limited exception highlighted by the Constitutional Court in the *Le Roux* decision, therefore, does not come into play. There was consequently no question of a breach of mandate but merely compliance with the plaintiff’s reasonable instructions to accept the offer and not undergo further medical assessments.

[47] In conclusion: Given the fact that the plaintiff accepted the settlement offer on 15 October 2011, and given the fact that she knew that the offer amounted to an under settlement and given the fact that summons were only issued in 2015, the claim has therefore prescribed.

Periphery issues

[48] Much time was spent in the cross-examination of Ramushu about what he ought to have done when the plaintiff refused to follow his advice that she should undergo further medical assessments. The implication was that, in continuing to act as the plaintiff’s attorney, he did something wrong.

¹⁰ *Ibid* at par/a 64.

¹¹ *Ibid* at para 89.

[49] I am in agreement that this is a red herring. Firstly, this point was not pleaded. Secondly, this attempt to discredit Ramushu does not resolve the dispute about whether or not he had advised the plaintiff to undergo further medical assessments. It also does not resolve the dispute as to whether Ramushu had been informed that the RAF's offer was too little but that the plaintiff nonetheless insisted on accepting the offer. Ramushu testified that there was, therefore, no obligation on him to withdraw as an attorney in those circumstances. This is borne out by an unreported full-bench decision in this division in *Du Toit Smuts and Matthews Phosa Attorneys and 7 Others v Okie Meshack Mandla Sibanyoni*.¹² There are striking similarities between *Sibanyoni* and the present case, most notably the fact that that case was also about an under-settlement of an RAF claim. The attorneys were likewise accused of breach of mandate for under-settling. The attorneys also pleaded that the under-settlement was due to the plaintiff's fault because the plaintiff in that case also refused to undergo further medical examinations as the plaintiff in that case (similarly to this case) was in a hurry to get his money. The plaintiff in *Sibanyoni* signed the settlement offer of the RAF as is the case *in casu*.

[50] In *Sibanyoni* the finding of the trial court was overturned by the Full Bench and the plaintiff's claim was dismissed. Dealing with the question of an attorney's obligations towards his client, the Full Bench found that all an attorney has to do is to ensure that his client is properly informed and it was not part of an attorney's duty to force his advice on his client. The Full Bench held that:

"When the client acts outside the scope of his attorney's advice, to which he is entitled to do, such conduct should not be imputed to his attorney. His attorney should not be blamed for any misfortune that may befall the client because of the client's conduct. The following expression is apt in these circumstances. The Plaintiff must 'lie on the bed one has made'".¹³

Conclusion

[51] In the premises, the plaintiff's claim is dismissed on the basis that the claim had prescribed.

Costs

¹² 19 October 2019.

¹³ *Ibid ad para 43*.

[52] In as far as costs are concerned, I am in agreement that it is an accepted practice that where attorneys are sued they employ the services of Senior Counsel because the imputations made against an attorney, and which may impact negatively on his reputation and standing as a legal practitioner, are acceptable reasons to justify the employment of senior counsel. Costs are therefore awarded on scale C.

Order

[53] In the event the following order is made:

"The claim is dismissed with costs inclusive of the costs of senior counsel on scale C"



JUDGE A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 20 January 2025.

APPEARANCES

For the plaintiff: Adv. Monkangwe

Instructed by: Mphela & Associates Inc

For the defendant: Adv T.A.L.L. Potgieter S.C.

Instructed by: Savage, Jooste & Adams

Date of Hearing: 15 – 17 & 30 October 2024