

SOUTH AFRICA / JUDGMENT

Daniels v Klaasen; Keith Sheldon Attorneys v Daniels (A306/2018) [2019] ZAWCHC 99 (14 August 2019) [2019] ZAWCHC 99

COURT

Western Cape High Court, Cape Town

BEFORE

Davis, LE Grange, Cloete

CASE / FILE NUMBER

A306/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: A306/2018

In the matter between: YVONNE CHARLOTTE JUNITH DANIELS Appellant and BARNITO
CHARLES KLAASEN Respondent

A 307/2018

In the matter between: KEITH SHELDON ATTORNEYS Appellant and YVONNE CHARLOTTE
JUNITH DANIELS Respondent

Judgment:

14 August 2019

DAVIS J

- [1] This case involves the possible liability of one or both of two attorneys for damage caused to a claimant who lodged a claim with the Road Accident Fund as a result of the death of her husband which was caused by a motor vehicle collision that occurred on 30 October 2003. Her claim prescribed in October 2008. The consequent inability to successfully claim against the Road Accident Fund was attributable to the legal assistance which she received during this period.

- [2] The crisp question for determination is whether either of the attorneys whose firms assisted her legally during the relevant period are liable for damages arising from this prescription of her claim. In the hearing before this Court, there was an appeal and a cross appeal. I shall refer to the appellant as Sheldon and the respondent as Daniels who is the appellant in the cross appeal

against Klaasen.

- [3] The court a quo was only required to deal with the question of liability as a separation between the merits and the quantum had been agreed.

After a trial in the court a quo Allie J held that, insofar as Klaasen was concerned, he had unilaterally acted as the attorney for the respondent at a time when

the claim had not yet prescribed. By contrast, Sheldon had failed to exercise a reasonable duty of care and adequate supervision

over the person who had dealt with appellant's claim, one Mr Richard Matthee who was not a qualified attorney but who had dealt with respondent's claim under the auspices of Sheldon's practice. In particular, Allie J found that Sheldon had failed to put in place measures to prevent respondent's claim (Daniels who is the appellant in the cross appeal) from prescribing. Accordingly, she ordered Sheldon to pay Daniels such damages as may be proved in due course. By contrast, Daniels' claim against Klaasen was dismissed with costs. As a result of this order, Sheldon has appealed against the order and Daniels has cross appealed in respect of the dismissal of her claim against Klaasen.

The factual background

- [4] Shortly after the passing of her husband, Daniels approached a firm of attorneys under the control of Mr David Nasson in order to prosecute her claim against the Road Accident Fund. On arrival at the offices of attorney Nasson she met Mr Richard Matthee. Mr Matthee was not an attorney but it appears that he was employed by Mr Nasson as general clerk. When Daniels arrived at Nasson's offices, another employee, Mr Martin Green, introduced her to Matthee and asked Matthee to complete the necessary third party forms to prosecute a MVA claim. Matthee duly informed Daniels that he would institute the claim against the Road Accident Fund. On 10 March 2004, Daniels signed a special power of attorney appointing Nasson to represent her in her claim against the Road Accident Fund. At this time, Klaasen was employed by Nasson and he operated his Ceres office.
- [5] During 2004 Nasson was suspended by the Law Society from continuing to practice. Discussions then took place between the then director at the Law Society and Klaasen, as a result of which the latter was requested to take over and attend to the files which previously had been dealt with by Nasson or others in his office. From the available evidence there were some 120 files that were taken over by Klaasen who set up his own practice, one of which was the file involving the matter concerning Daniels. Matthee who now was employed by Klaasen as a paralegal continued to attend to this file. In evidence before the court a quo

Klaasen confirmed that Matthee attended to these files under his supervision.

- [6] As an illustration of this practice, during this period various letters were generated on behalf of Daniels including one of 6 January 2003, which was signed by Mr Klaasen in which the following appears:

‘Ongeveer 13 Maart 2004 was ‘n derde party eis by die padongelukkigfonds ingedien.

Ons verstaan en het begrip vir die feit dat die onderhoudsbeampte gemoeid met die aangeleentheid tyd nodig sou hê met versameling van inligting om ‘n volledige dossier saam te stel.

Verskeie korrespondensie was inderdaad gewissel tussen ons en die stasiekantoor in Atlantis. Ons verwys u dan ook graag na ons briefinhoud gedateer 24/10/05 (sien afskrif aangeheg), die inhoud was vanselfsprekend.

...

Ons kilent is baie ongelukkig en bekommerd van die ellelange tydsverloop oor hantering van die dossier aangesien ons asgevolg daarvan nie vordering kan maak om ons werksaamhede af te handel nie. Kliënt versoek dat u kantoor dringend optree en daadwerklik

stappe sal neem om die betrokke ondersoekbeampte aan te spreek ter finalisering van hierdie aangeleentheid.’

- [7] Although this correspondence was signed by Klaasen, it appears to be common cause that Matthee dealt almost exclusively with the Daniels matter. In August 2006 Matthee left the employ of Klaasen and went to work for Sheldon. Under cross examination, Matthee testified that he had taken certain files with him from Klaasen’s office but only one of these had not been brought to the attention of Sheldon, namely the file in respect of Daniels’ claim. It is common cause that prescription of the claim took place while Matthee was in the employ of Sheldon.
- [8] Upon Matthee’s resignation, Klaasen had a conversation with Matthee who insisted that the files which he obtained previously from Mr Green when he was employed by Nasson, involved matters with which he had continuously dealt and that he intended to take these files and work with them while employed by Sheldon. Following this request, Klaasen requested his secretary, Ms Collins, to contact Sheldon’s offices ‘to get some confirmation whether as what Mr Matthee had said that he had discussed it with Mr Sheldon and then is it okay for Mr Matthee to take the files over with him to Mr Sheldon’s.’ Accordingly to Klaasen, Collins initiated the conversation which took place in Klaasen’s presence as well as in the presence of Matthee. According to Klaasen, as a result of this conversation ‘at that stage I was then satisfied that I did not foresee any problems because the files have been taken over to another attorney who would then be able to address those files with the necessary skills’. Ms Collins testified that it was Matthee who spoke to Sheldon and confirmed ‘dat ek die leers wel saam kan bring want Mnr Klaasen vereis dit.’

[9] Klaasen testified that in 2007 he received a call from the Atlantis Advice Office concerning Daniels' claim during which it was alleged that the RAF had paid the claim but Klaasen had not made payment over to respondent. Klaasen said that he had then examined his records, realised that this was a file that Matthee had taken with him and called Sheldon's office to determine what had occurred in respect of Daniels' claim. He spoke with Matthee and told the latter that there were 'people who are accusing me that there was monies paid into my account and then I enquired from them as to whether the money was maybe paid into their account'. Klaasen informed Matthee that he should contact Daniels, Matthee replied that he was still busy with the file but that he would contact Daniels. The next information that Klaasen received concerning the Daniels claim was when he received an email from Riaan De Kock Attorneys with regard to the matter in 2012.

[10] It was also common cause that the mandate which respondent had signed with David Nasson Attorneys on 10 March 2004 had not been

terminated. While respondent testified that she was unaware that Matthee had left Klaasen's employ, she tracked him down to the offices of Sheldon 'want dus die enigste office wat ek toe nou ken daar.' When she arrived at Sheldon's office she found Matthee. While there was a dispute as to how Daniels learnt how Matthee had moved from Klaasen to Sheldon's office there is no dispute that, from August 2006 Daniels knew that Matthee was now working from Sheldon's premises, and that she 'accepted that he's continuing with my matter'. When asked whether it did not perturb her that Matthee had moved from one attorney to another, she said 'it did not actually worry me cause I just took it like it's for him to move from one attorney to the other, it's the way he works for maybe better money or whatever I don't know.'

The reasoning of the court a quo

[11] Allie J found against Sheldon, on the basis that Daniels' claim had prescribed during the time that Matthee was employed by Sheldon and that Daniels had proved that Matthee at all relevant times had acted in the course and scope of his employment with Sheldon. By contrast, the learned judge held that Klaasen was no longer the supervising attorney for Daniels' claim in 2007, a year before the claim had prescribed. Nonetheless he had spoken with Matthee and informed him that Matthee was obliged to report progress to Daniels. Accordingly, she concluded: 'at best it can be said that Klaasen, unilaterally acted as the attorney for the plaintiff at the time when the claim had not yet

prescribed.' By contrast, Sheldon had failed to exercise a reasonable duty of care and adequate supervision over the work of Matthee who had as paralegal (or administrative assistant) dealt with the claim under the auspices of Sheldon's practice and further had failed to put in place measures to prevent the claim from prescribing.

The appeal

- [12] The core of Sheldon's argument on appeal turns on the submission that he was unaware that Matthee, who was now employed by him, was in possession of Daniels' file and thus responsible for the prosecution of the claim against the Road Accident Fund. The core of this submission was based on the argument that for some reason, unknown to Sheldon, Matthee had not disclosed that he was in possession of this particular file. Sheldon testified that he was unable to enlighten the court about Matthee's motives and that Matthee should be asked to answer this question. According to Sheldon, when he was first summonsed about the matter it was then for the first time that he became aware of the existence of the file which had been in Matthee's possession. He was unaware of the existence of Daniels and her name had never appeared on any of the diaries which were possessed by the firm. Furthermore, he said: 'Op geen stadium het Barnito Klaasen formeel met my gekomunikeer om te sê dat Mnr Matthee moontlik leers na my kantoor toe gaan bring ook nie.'
- [13] In essence, Sheldon's argument was one of a denial of any knowledge of the existence of the Daniels file coupled to the testimony of Matthee, namely that this was the one file which he (Matthee) had not disclosed to Sheldon. This evidence stands in stark contrast to that of Klaasen, confirmed by Ms Collins, concerning a conversation between Matthee and Sheldon about the transfer of files.

It is also an explanation that defies a logical explanation, namely the reason as to why of all the files taken over by Matthee, this was the only one which had not been disclosed. The better explanation is that Matthee, who it was common cause was a friend of Sheldon, sought to protect his friend from liability by denying that Sheldon had any knowledge of this particular file. There is simply no plausible basis by which to disturb the finding of the court a quo in this connection.

- [14] The further submission which was made was that Daniels had never terminated her mandate with Nasson and therefore with the attorney

who had taken over Nasson's files, being Klaasen. Accordingly, it could not be said that Sheldon was liable in circumstances where a mandate existed between Klaasen and respondent.

- [15] In other words if the mandate which had been granted to Nasson pursuant to the signed power of attorney in March 2004, which authority was transferred to Klaasen had not been terminated, the question arises as to whether Klaasen, as opposed to Sheldon, was liable for the claim prescribing and therefore the loss which had been incurred by Daniels. This question however turns on the examination on the law of mandate.

The law of mandate

- [16] In *AN and G Coal Mining v Stuart and others* 1981 (3) 521 (WLD) at 528-529 Botha J (as he then was) said the following:

'Assuming, then, in the applicant's favour, that authority to enter into a particular contract can, in principle, survive an attempt to enter into the contract which is abortive because of an error on the part of the grantee of the authority resulting in the contract being invalid, it seems to me that such a survival is subject to limitations which, in the context of the facts of the present case, may

be stated in different ways, all of which amount to much the same thing. In my view the surviving authority will lapse if there is a material supervening change in the circumstances, of a kind of that was not within the contemplation of the grantor and the grantee of the authority at the time when it was given, ... or if the supervening circumstances justify an inference that the authority had expired or had been revoked,... or if there is a change in the circumstances from which the grantee should reasonably infer that the grantor would not consent to the re-exercise of the authority if he knew the facts.'

[17] In support of the proposition that a range of circumstances might justify an inference regarding the termination of a mandate, Botha J referred to an earlier decision in *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A) at 27, where reference is made to both Story, *Commentaries on the Law of Agency* (9th ed) and Pothier *Mandat* Chapter 4 para 119. Botha JA then said the following:

'Story in his *Commentaries on the Law of Agency*, 9th ed, para 480, p 592' states that:

"So, if a person, about to depart on a voyage, should, by power of attorney, appoint an agent to manage his affairs until his return

home, the authority would expire by its own limitation. Indeed, Pothier contends that, if a power is given by a person, going abroad, to an agent to manage his affairs, without containing any words of limitation as to its duration, it ought to be presumed to be revoked upon his return home, unless there are some circumstances in the case to repel that presumption; such as allowing the agent to act in the agency, without objection, after his return home."

The reference to Pothier is to be found in *Mandat*, ch 4, para 119, where the learned author says:

"When a person, who has to go on a long journey, has given a power of attorney to someone to manage his affairs, whether the power of attorney is limited in any way as to time, it is nevertheless assumed that he was given it only for the duration of his absence, and his return presumes the revocation of the power of attorney, unless this presumption has been annulled by a contrary presumption, such as that which would result when the agent, on the return of the principal, continues to manage his affairs to the full knowledge of the principal who has acquiesced therein".

[18] To this Botha JA added at 27 that neither Story nor Pothier intended to lay down any principle of law for 'they merely state that the expiration or revocation of a power of attorney may in certain circumstances be inferred as a fact from other facts.'

[19] There is authority that a mandatory can renounce a mandate subject to the qualification that he or she forfeits any claim for expenses incurred prior to the renunciation. *LAWSA* Volume 17 at para 16 citing *Grotius* 3.12.12 and *Voet* 17.1.17 in support thereof. In this connection it is instructive that *Voet* 17.1.7 writes of another instance when the mandate is taken as having been terminated 'another instance is when at different times one appoints two agents for the same business, inasmuch as it appears as by assigning the latter agent to have taken away the management from the earlier (The Selective *Voet: Commentary on the Pandects* (Translation by Percival Gane) (1956): Vol 3 at 271).

- [20] This is analogous to the facts in this case. While there was no express termination of the mandate in that the power of attorney signed granting authority to Nasson in 2004 was never formally terminated, the evidence, as I have set it out, indicates that, insofar as Klaasen was concerned, the mandate had terminated when he obtained confirmation from Sheldon via Matthee that the various files would be taken over by Sheldon's practice. Further, there is clear evidence that Daniels regarded Matthee as her representative, albeit that he was not legally qualified, and that she had continued to approach him after he had left the employ of Klaasen and while he was employed by Sheldon. In other words, insofar as Daniels was concerned, she regarded the position as one where she was represented by Matthee and she knew that he was employed from 2006 by Sheldon, after he had left Klaasen's employ. Accordingly, it is reasonable to infer that the authority which had been bestowed upon Klaasen by Daniels had expired, once Matthee had taken the file and began his employment with Sheldon.
- [21] It follows that the mandate was with Sheldon and it was he who bore the responsibility of insuring that his paralegal (or clerical assistant; the particular designation being of no import insofar as this dispute is concerned) was adequately supervised in order to properly prosecute Daniels' claim to fruition. That claim clearly expired while Matthee was in the employ of Sheldon.
- [22] Once the various tendentious explanations of Sheldon and Matthee insofar as Sheldon's knowledge of the Daniels file are rejected, it must follow that it was Sheldon who bore the legal responsibility of the loss caused by the negligent prosecution of the claim against the RAF and the subsequent damages which were suffered by Daniels and which still remain to be proved.
- [23] Given the complexity of the law in this regard and Daniels' clear dependence upon attorneys and her possible confusion of the role of Matthee and the transfer of the relevant file from Nasson to Klaasen and then to Sheldon, it appears to me that it would not be just that the costs order of the court a quo against respondent in Klaasen's case be upheld. In my view, each party should pay their own costs in this connection.
- [24] For these reasons therefore the following order is made:
1. The appeal by appellant Sheldon in case no A307/2018 is dismissed with costs.
 2. The cross appeal by appellant Daniels in case no A 306/2018 is dismissed.
 3. The order of Allie J is altered to read as follows:
 - 3.1 First defendant is ordered to pay plaintiff such damages as may be proved in due course;
 - 3.2 First defendant is ordered to pay party and party costs on the highest costs scale including the wasted costs occasioned by all previous postponements.
 - 3.3 Plaintiff's claim against second defendant is dismissed; there is no order as to costs.

I agree.

LE GRANGE J

I agree and it is so ordered.

CLOETE J

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