

SOUTH AFRICA / JUDGMENT

Moose v W Van Der Schyff Attorneys (15982/2021) [2025] ZAWCHC 266 (23 June 2025) [2025] ZAWCHC 266

COURT

Western Cape High Court, Cape Town

BEFORE

F S G Sievers

CASE / FILE NUMBER

15982/2021

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FLYNOTES:

RAF

– Claim against attorney – Prescribed
claim –

Breached

of mandate – Failing to prosecute claim timeously –
Plaintiff had established a valid claim against Fund

–

Mandate to pursue claim proven as evidenced by signed documents
and correspondence – Failure to issue summons
within

prescribed period constituted a breach of professional duty –

Admitted to possessing enough details to draft

summons –

Wrongful and negligent breach of agreement and duty of care –

Liability for damages established.

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Not Reportable

Case no: 15982/2021

In the matter between: DONOVAN HADLEY
MOOSE
PLAINTIFF
and
W VAN DER SCHYFF
ATTORNEYS
DEFENDANT

Coram: SIEVERS AJ

Heard: 5 JUNE 2025

Delivered: 23 JUNE 2025

Summary: Claim against
an attorney for breach of mandate in respect of a prescribed claim.

ORDER

1.
The defendant is liable to the plaintiff for such
damages as may be proved or agreed.
2.
The defendant shall pay the plaintiff's
costs of suit, as well as the costs of counsel on scale B.

JUDGMENT

Sievers AJ:

Introduction

- [1] The plaintiff, an adult male basic life support ambulance practitioner instituted action against the defendant, a practising attorney, for the recovery of damages which he suffered based on an alleged breach of mandate. The plaintiff contends that the defendant negligently caused his claim pursuant to the provisions of the Road Accident Fund Act 56 of 1996 ('the RAF Act') to prescribe.
- [2] The parties requested a separation of issues and that the merits of the plaintiff's claim be determined first. Accordingly, and at the request of the Court, the parties filed a joint practice note dated 25 November 2024, setting out the issues to be determined.
- [3] In accordance with the agreement recorded in the joint practice note, the Court is called upon to consider the following issues to determine the defendant's liability:
 - a. Whether the plaintiff had a valid claim against the Road Accident Fund.
 - b. Whether an agreement was concluded between the plaintiff and the defendant in terms whereof the defendant was mandated to lodge and prosecute a claim against the Road Accident Fund ('the mandate').
 - c. Whether the defendant breached the agreement.

- [4] The plaintiff testified in person and further relied on the evidence of one further witness, Nomade Serfontein.
- [5] The defendant, a sole practitioner William Arthur van der Schyff, testified in person and called Ms Mushfeequah van der Berg as a witness.

Background facts and pleadings

- [6] The plaintiff alleges that he engaged the services of the defendant during or about August 2014. In this regard, the plaintiff pleads that the defendant, represented by Mr W van der Schyff, accepted instructions to perform, inter alia, the following professional services as the attorney acting on behalf of the plaintiff:
 - a. To lodge a valid RAF claim with the RAF timeously and within the statutory time limit for such a claim, being three years from the date of the collision on 9 August 2011.
 - b. To prosecute the RAF claim by way of legal proceedings timeously and within the statutory time limit of five years from the date of the collision on 9 August 2011, should this be necessary.
- [7] The plaintiff's claim against the RAF arose from a motor vehicle collision, which occurred at 18h30 on 9 August 2011 in Vanguard Drive, Athlone, Western Cape, when a black Mercedes Benz ('the insured vehicle') at the time driven by one Ronald Williams ('the insured driver') collided with an ambulance driven by the plaintiff.
- [8] The plaintiff alleges that the collision was caused by the sole negligence of the insured driver and that he sustained serious bodily injuries as a result of the collision. The plaintiff accordingly alleged that he had suffered damages in the form of past medical expenses, future medical related expenses, loss of earnings and general damages.
- [9] The plaintiff pleaded that the defendant when accepting plaintiff as a client undertook a legal duty towards plaintiff to execute his claim against the RAF.
- [10] The plaintiff further avers that during March 2020 he established that because of the defendant's breach of the agreement, alternatively the breach of its legal duty to him, his RAF claim had prescribed as the defendant had wrongfully and negligently failed to prosecute the RAF claim timeously and within the statutory time period of five years.
- [11] The defendant denied knowledge of the collision and the averment that the collision was caused by the sole negligence of the insured driver.
- [12] The defendant further denied the allegations made by the plaintiff in respect of the agreement but averred that during the time that he was in any manner dealing with the affairs of the plaintiff, he acted with the requisite skill and without negligence.
- [13] The defendant further pleaded that:

- a. he at all times acted on the basis of instructions given to him by the plaintiff whilst he was his client;
- b. he could not take any further steps with regards to the plaintiff's claim as the plaintiff, despite numerous attempts by the defendant, did not contact the defendant timeously or at all in order for the defendant to proceed with issuing summons against the RAF;
- c. he accordingly denied that the defendant did or omitted to do anything for and on behalf of the plaintiff which was in conflict with his contractual duty towards to the plaintiff;
- d. he could not proceed with issuing summons against the RAF, as no information was furnished by the plaintiff in order to compute an amount commensurate with injuries suffered by the plaintiff.

Issues to be determined

[14] As appears from the above, the following issues are to be decided to determine the defendant's liability:

- b. Whether an agreement was concluded between the plaintiff and the defendant in terms whereof the defendant was mandated to lodge a prosecute a claim against the Fund.

Plaintiff's claim against the Road Accident Fund

[15] In establishing whether the plaintiff had any likelihood of success in a claim to be instituted against the Road Accident Fund, it is necessary to decide whether:

- a. the plaintiff was involved in a motor vehicle collision;
- b. the plaintiff suffered bodily injuries;
- c. the bodily injuries were as a result of the negligent driving of the insured driver.

The collision

[16] The plaintiff confirmed that he was involved in a collision but has no recollection thereof because of the severe injuries that he sustained.

[17] Ms Nomade Serfontein testified on behalf of the plaintiff. She was a passenger in the ambulance being driven by the plaintiff at the time of the collision. She testified that they had been called to assist a patient in Bonteheuwel and were driving to New Somerset Hospital in Cape Town with the patient who was in a critical condition.

[18] Serfontein testified that they were on Jakes Gerwel Road turning onto the offramp on to the N2 in direction of Cape Town, and that she was in the patient compartment of the ambulance at the time. They drove onto the bridge to go onto the intersection of the N2 when she suddenly felt the impact on the left side of the ambulance, which flipped over.

- [19] Serfontein advised that the ambulance was not travelling at speed as there was traffic at the time. She advised that the plaintiff would stop at stop streets and only proceed if it was safe to go over. She further confirmed that the ambulance made use of both the lights and sirens when it was travelling with a patient in a critical condition and gave an explanation as to how she knew that both the lights and siren were operating at the time of the collision.
- [20] Serfontein testified that upon exiting the ambulance after the collision, she noted the plaintiff lying in the road in a critical condition.
- [21] Serfontein stated that on the day of the collision she had felt, while sitting in the rear of the ambulance, that the ambulance had slowed down and proceeded very slowly before the impact. She confirmed under cross-examination that the ambulance had slowed down and that the plaintiff pulled away slowly whereupon she felt the impact.
- [22] Her evidence was not disputed under cross-examination and no contrary version of the events that day were put to her.

Hearsay evidence

- [23] The defendant brought an application, in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988, to introduce an affidavit deposed to by the insured driver, Williams, who had since passed away
- [24] The plaintiff consented that the affidavit be admitted on condition that the probative value thereof be considered on argument. Clearly, the plaintiff was not able to cross-examine the deponent of the affidavit and accordingly the reliability thereof cannot be determined.
- [25] In the affidavit, Mr Williams stated that at the time of the collision he was coming from Vangate Mall going to Bonteheuwel in the right lane. He stated that the robots were green for him to proceed and that he did not see any red lights or blue lights or sirens. He advised that he was driving his black Mercedes and did not see the ambulance and only saw what had collided with his vehicle when he exited his vehicle. He was not injured in the collision. It is noted that Mr Williams did not deny that the ambulance lights or sirens were activated at the time of the collisions but stated that he did not see them.
- [26] The defendant also called Ms Mushfeequah van der Berg to testify on his behalf. This evidence came as a surprise as no reference was made to Ms Van der Berg in the affidavit filed in support of the application to introduce the hearsay evidence.
- [27] Ms Van der Berg testified that on the day of the collision, she was a front seat passenger in the insured vehicle. She testified that the ambulance did not have any lights or siren on at the time of the collision and that the insured vehicle was hit on the driver's side by the ambulance, which had driven over a red traffic light. She stated that the traffic lights were green in their favour.

- [28] During cross-examination Van der Berg conceded that she saw the ambulance approaching the traffic lights from the right-hand side. Van der Berg confirmed that given the fact that the insured driver was a very observant driver, he would similarly have noted the ambulance approaching from the right-hand side. Van der Berg conceded that the insured driver, despite of having noted the ambulance, did not slow down or apply brakes and continued at the speed that he was driving prior to entering the intersection.
- [29] Van der Berg further conceded that generally speaking when approaching an intersection, vehicles should give an ambulance the right of way and that in spite of the aforesaid, the insured driver did not slow down at all and kept proceeding at the speed at which he was approaching the intersection.
- [30] Van der Berg had made no statement at the time of the accident and accepted that as the accident had occurred some time ago, this could have affected her memory. She had read the insured driver's affidavit several times to refresh her memory.
- [31] It is important to note that the evidence upon which the defendant wishes to rely on in respect of the collision was never put to the plaintiff, nor to Serfontein in cross-examination.
- [32] In this regard, the evidence that the ambulance was driving with its siren and lights on was never contested, neither was Serfontein's evidence challenged that the ambulance was moving very slowly and came to a standstill, before proceeding just prior to the impact. It was also not put to Serfontein in cross-examination that another witness would contradict her version.
- [33] The implication of such a failure was identified in *President of the Republic of South Africa and others v Rugby Football Union and others* [1] as follows:

'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.'

- [34] Serfontein clearly should have been cross-examined upon the matters which the defendant alleges makes her unworthy of credit. In this regard, in *Small v Smith* [2], Claassen J said:

‘It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if needs be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness’s evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.’

[35] Accordingly, the evidence presented by the defendant, contrary to the evidence of the plaintiff and Serfontein, which was not put to them under cross-examination, cannot be accepted. See *Maite v Borman Duma Zitha Attorneys* [3].

[36] It is in any event common cause that the plaintiff was driving a privileged vehicle in the execution of his duties at the time of the accident. Such a driver may disregard the directions of a road traffic sign, which is displayed in a prescribed manner, provided that:

- a. he or she shall drive the vehicle concerned with due regard to the safety of other traffic; and
- b. such vehicle shall be fitted with a device capable of emitting a prescribed sound with an identification lamp, as prescribed, and such device shall be so sounded, and such lamp shall be in operation while the vehicle is driven in disregard of the road traffic sign [4].

[37] Furthermore, a driver of a non-privileged vehicle will give immediate and absolute right of way to a vehicle sounding a device or bell or displaying an identification lamp [5].

[38] I am satisfied that the plaintiff has established that the ambulance’s warning devices (the lights and siren) were activated at the time of the collision. It does not avail the insured driver to state that he did not hear the siren nor see the activated lights. The insured driver was required to drive at such a speed that he was able to react to the sound of the privileged vehicle’s warning device in time to avoid causing damage to the ambulance and the plaintiff [6].

[39] Based upon Serfontein’s evidence it is found that the collision occurred because of the sole negligence of the insured driver.

Plaintiff’s bodily injuries

[40] The plaintiff testified that he was hospitalised following his injuries and that they consisted of bilateral chest injuries, a fractured humerus on the right-side of the upper arm and fractures of L1, L2 and L4. The plaintiff further confirmed the medical report obtained from Dr Elmin Steyn, a surgeon, which sets out the polytrauma that he sustained as testified.

[41] The defendant admitted during cross-examination that the plaintiff was injured because of the collision.

[42] I accordingly find that there would have been a likelihood of success in proceedings against the Road Accident Fund.

The agreement between the parties ('the mandate')

- [43] The defendant testified that he was a sole practitioner who had been in practice since 2000 to the present.
- [44] The plaintiff testified that he met the defendant at his house where the defendant agreed to assist him with a RAF claim. The plaintiff testified that Van der Schyff requested him to provide him with several documents relating to his hospitalisation, as well as the merits document from the Athlone Police Station. The plaintiff confirmed that he provided the defendant with all the requested documents.
- [45] The plaintiff further testified that Van der Schyff had visited him in Caledon in 2014 and requested him to sign a special power of attorney in terms of which the defendant was appointed inter alia to do all things necessary to finalise the claim for compensation and to do or to have done whatsoever was required. The plaintiff further signed a so-called medical authority.
- [46] The defendant in his evidence admitted that he received a mandate from the plaintiff to proceed with the claim against the Road Accident Fund, and that the claim was timeously lodged within the three-year period. He was referred to the lodgement letter dated 7 August 2014 sent by him to the claims manager of the Road Accident Fund in which he recorded that the sole cause of the accident and the relevant injuries were due to the insured driver's negligent driving. Van der Schyff further confirmed that following
- the lodgement, he received correspondence from the Road Accident Fund confirming that the claim was lodged timeously.
- [47] Van der Schyff further testified that on the 25th of February 2015, he wrote to the Road Accident Fund confirming that he was acting on behalf of the plaintiff and requested an update as to the progress regarding the claim. He advised that he received no further correspondence from the Road Accident Fund and acknowledged that it was a valid claim and there had been no objection made regarding it.
- [48] The plaintiff has established that the defendant was properly mandated to lodge a claim against the Road Accident Fund and to institute action timeously.

Did the defendant breach the agreement?

- [49] The defendant in his plea conceded that summons was not issued against the Road Accident Fund timeously. Mr Van der Schyff further admitted during cross-examination that he knew that proceedings had to be instituted against the Road Accident Fund within the five-year period as regulated by s 23 of the Road Accident Fund Act. >
- [50] Mr Van der Schyff further accepted that his mandate was to pursue the claim to its fullest and that he had not issued summons against the Fund within five years of the accident or at all.

[51] Accordingly, the plaintiff has established that the defendant failed to prosecute his claim by way of legal proceedings (by issuing a summons) timeously and that this was a wrongful and negligent breach of the agreement and the defendant's duty of care.

The defendant's defences

[52] The defendant pleaded that he was unable to take further steps regarding the plaintiff's claim as the plaintiff, despite numerous attempts by him, did not contact him timeously in order to proceed with issuing of summons against the Road Accident Fund.

[53] The defendant further pleaded that the plaintiff failed to inform him of a lost of earnings and that he did not possess the necessary funds to appoint and actuarial scientist to compute the plaintiff's losses and expenses.

[54] The defendant, in the result, pleaded that he could not proceed with issuing a summons against the Road Accident Fund as no information was furnished by the plaintiff to compute an amount commensurate with the injuries suffered.

[55] Under cross-examination, however, Van der Schyff conceded that he was able to deal with the four elements of the quantum of the plaintiff's claim. He firstly conceded that he was in a position to estimate the past medical expenses and similarly, the future medical expenses. Regarding the general damages component, given the fact that the defendant had knowledge of the injuries sustained, he accepted that he was able to provide an estimate of the general damages claim. Thirdly, Van der Schyff accepted that he had various employer's reports in his possession and that the details of the employer were included in the RAF 1 Form and accordingly, he was able to obtain sufficient information with regard to loss of earnings. With reference to Rule 18 of the Uniform Rules of Court, it was put to the defendant that a claim for loss of earnings is an estimate and that he could have provided such an estimate in the particulars of claim. Van der Schyff conceded that he could have contacted the plaintiff's employer

to obtain whatever necessary details were required to proceed.

[56] In the witness box, Van der Schyff contended that he would have instructed counsel to assist with the drafting of the particulars of claim, but that he did not have a mandate to instruct counsel.

[57] In surprising testimony Van der Schyff stated that he had informed the plaintiff that the claim was going to prescribe and that a summons had to be issued. He stated that he had informed the plaintiff of this telephonically. This had never been put to the

plaintiff in cross-examination.

- [58] Van der Schyff testified that he spoke to the plaintiff telephonically during 2015, at which point in time he informed the plaintiff that his claim was going to prescribe. He acknowledged that the plaintiff was a layperson and had no knowledge of the regulations and time limits in respect of the Road Accident Fund, and as a result was relying on Van der Schyff's guidance in that regard.
- [59] Van der Schyff conceded that a reasonable attorney in his circumstances knowing that a claim was going to prescribe had a duty to ensure that the matter did not prescribe.
- [60] As a result, the only defence offered by the defendant in the circumstances was that there was no mandate to brief counsel to draft the particulars of claim. In answer to a question by the Court, Van der Schyff answered that he informed the plaintiff telephonically that the claim was a high court claim and that they were required to proceed with summons and as a result, needed to instruct or brief counsel. Van der Schyff then acknowledged that the plaintiff had during the telephone conversation in 2015, instructed him to proceed to issue summons in the high court.
- [61] Accordingly, the defendant failed to sustain any defence that he was not able to institute the action prior to the prescription of the claim.

Conclusion

- [62] The defendant accepted a mandate from plaintiff to pursue a claim against the Road Accident Fund. The claim was lodged timeously within the three-year period by the defendant, however, summons was not issued within the prescribed five-year period and resultantly the claim against the Road Accident Fund prescribed.
- [63] The defendant had the necessary information about the plaintiff, the accident, the offending vehicle, the drivers involved, as well as the injuries to proceed with the issuing of summons.
- [64] Clearly the information which the defendant had in his possession was sufficient to enable an informed calculation and composition of the quantum of compensation to be claimed to satisfy the requirements of Rule 18 of the Rules of Court.
- [65] An attorney who undertakes a mandate is considered to hold himself out as possessing the necessary skills and to discharge such mandate diligently and is accordingly liable for damages occasioned by his or her negligence in the discharge of the duties emanating from such trust. (*Mlenzana v Goodrick & Franklin* 2012 (2) SA 433 (FB) paras [96] to [101])
- [66] Van der Schyff testified that he is a practising attorney and has been in practice since the year 2000. He further testified that he is familiar with Road Accident Fund claims and had knowledge of the fact that the claim would prescribe within five years' time if the summons was not issued. No attorney of ordinary competence and diligence, more so with the experience of the defendant in these types of matters, would have allowed the claim to become prescribed.

[67] It is to be noted that whilst it was open to the defendant to withdraw from the case for lack of instructions or proper instructions, no such option was ever exercised.

[68] Accordingly, as the defendant failed to exercise the skill, knowledge and diligence expected of an average attorney, it follows that the defendant acted negligently and that his negligence makes him liable to the plaintiff.

[69] Accordingly, and for the reasons set out above, I have come to the overall conclusion that the plaintiff has established, on a balance of probabilities, all the essentialia of his claim against the defendant. I accordingly find that the defendant is liable to the plaintiff for such damages as may be proved or agreed, plus costs.

[70] It is accordingly ordered that:

1. The defendant is liable to the plaintiff for such damages as may be proved or agreed.
2. The defendant shall pay the plaintiff's costs of suit, as well as the costs of counsel on Scale B.

F S G SIEVERS

ACTING JUDGE OF THE HIGH COURT

Appearances

For plaintiff: Adv E Benade

Instructed by: Mr J Potgieter (DSC Attorneys)

For defendant: Adv S Banderker

Instructed by: Mr W Van der Schyff

[1] President of the Republic of South Africa and others v Rugby Football Union and others 2000

(1) SA 1 (CC) at para 61.

[2] Small v Smith 1954

(3) SA 434 (SWA) at 438.

[3] Maite v Borman Duma Zitha Attorneys (42064/2017)

[2025] ZAGPJHC 183 (18 February 2025).

[4] Section 58 of the National Road Traffic Act 93 of 1996.

[5] Regulation 308 of the National Road Traffic Act 93 of 1996.

[6] S v Phillip 1968

(2) SA 209 (C) at 261C-D and E-F.

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