



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION

Case No.: 2232/2016

Date Heard: 28 July 2022

Date Delivered: 23 August 2022

In the matter between:

BONISWA ESTHER NTOMBANA

Plaintiff

and

MESSRS NEL MENTZ STEYN ELLIS INCORPORATED

Defendant

JUDGMENT

EKSTEEN J:

[1] The plaintiff, Ms Boniswa Ester Ntombana (Ms Ntombana) claims damages arising from an alleged breach of mandate by defendant, Messrs Nel Mentz Steyn Ellis Incorporated (Nel Mentz), a firm of attorneys. She was injured in a motor vehicle accident in Booyse Street, Humansdorp on 12 November 2010 when a motor vehicle collided with her whilst she was crossing the street. As a result of the collision she sustained severe bodily injury and, accordingly, instructed Nel Mentz to institute a claim against the Road Accident Fund (the RAF) for due compensation. Nel Mentz accepted the mandate, but failed to pursue the claim, which has since become prescribed.

Hence, the claim against Nel Mentz for damages arising from the prescription of her claim against the RAF.

[2] Ms Ntombana alleged that the negligence of the driver of the vehicle, one Zote (Mr Zote) was the sole cause of the collision and that she suffered damages in the sum of R1 453 160.00 in consequence of the injuries sustained in the collision. She contended that, but for the negligent failure of Nel Mentz to pursue her claim, she would have recovered the said amount from the RAF.

[3] The liability of an attorney to a client for damages arising from his negligence is based on a breach of contract between the parties. It is an implied term of the mandate that an attorney will exercise the skill, adequate knowledge and diligence expected of an average practicing attorney.¹ Where an attorney falls short of this standard, he commits a negligent breach of his mandate.

[4] In order for a plaintiff to succeed in a claim against an attorney he is required to allege and prove:

- (a) A mandate given to the attorney;
- (b) a breach of the mandate;
- (c) negligence in the sense of his failure to exercise the skill, adequate knowledge or diligence expected of an average attorney;

¹ *Mouton v Die Mynwerksunie* 1977 (1) SA 119 (AD), [1977] 1 All SA 242 (A); *Jowell v Bramwell-Jones and Others* 2000 (3) SA 274 (SCA), [2000] 2 All SA 161 (A); *Steyn NO v Ronald Bobroff and Partners* [2012] ZASCA 184 (SCA), 2013 (2) SA 311 (SCA), [2013] 1 All SA 471 (SCA); and *Drake Flemmer and Orsmond Incorporated and Another v Gajjar NO* [2017] ZASCA 169 (SCA) 1, 2018 (3) SA 353 (SCA), [2018] 1 All SA 344 (SCA).

- (d) damages, which would generally require the proof of the likelihood of success in the aborted proceedings;² and
- (e) that damages were within the contemplation of the parties when the contract was concluded.³

[5] As I have said it is common ground that Nel Mentz accepted Ms Ntombana's mandate to claim damages from the RAF and that they failed to deliver. At the start of the trial the parties agreed that if Ms Ntombana was able to establish that the collision had been caused by the sole negligence of Mr Zote, Nel Mentz would be liable to her in the amount of R800 000.00, calculated as at the date of trial, as a result of their breach of mandate. However, Nel Mentz denied that she had suffered any damages as a result of their failure to institute action because, they said, Ms Ntombana's negligence had been the sole cause of the collision. In the alternative they contended that if Mr Zote had been negligent, then her negligence also contributed to the cause of the collision and that she would only have recovered a portion of her damages from the RAF. Thus, the only issue before me was whether Ms Ntombana would have succeeded in her action against the RAF, and if so, how much of her damages would she had recovered.

[6] I turn to the evidence. Ms Ntombana was 58 years old at the time of the accident. She explained that she had lived in Jeffrey's Bay and had proceeded in a taxi to Humansdorp where she intended to visit a school in order to make arrangements for her grandchild's schooling. The taxi proceeded up Booyse Street and she said that it

² *Dhooma v Mehta* 1957 (1) SA 676 (N)

³ *Bruce NO v Berman* [1963] 3 All SA 181 (T), 1963 (3) SA 21 (T)

came to a stop on the left hand verge of the road shortly before a pedestrian crossing. There she alighted and waited on the left hand verge until the taxi had proceeded out of sight. She then proceeded to cross the road and had already reached the opposite verge of the road, with one foot already on the gravel, when she was struck by the motor vehicle on the left hand side of her body. She never saw or heard the vehicle approaching and after the impact she fell to the ground and was dizzy, but she does have a recall of the driver speaking on his cellphone and she thought that he had phoned the ambulance.

[7] She presented her evidence with reference to a series of photographs of the alleged scene of the accident which depicts a pedestrian crossing in Booyse Street. A Google aerial photograph of the area was later presented in evidence that shows the pedestrian crossing in Booyse Street, approximately one and a half blocks from the T-junction with Jacobs Street. The "Graslaagte Primary School" is situated on the property bordering on Booyse Street and Jacobs Street with its entrance in Jacobs Street. Ms Ntombana said that she intended to proceed to the school after alighting from the taxi.

[8] Mr Zote testified on behalf of the defendant. His version is irreconcilable with that of Ms Ntombana. He said that he had travelled in Jacobs Street to the junction with Booyse Street. At the T-junction, where Booyse Street joins Jacobs Street, Mr Zote said that there is a three-way stop street. He had stopped at the stop street in Jacobs Street before turning right into Booyse Street and had noted a sedan vehicle stationary

at the stop street in Booyse Street intending to turn to its left into Jacobs Street. When he had satisfied himself that it was safe to advance into Booyse Street he proceeded and had travelled approximately 10 to 11 meters into Booyse Street, when he suddenly saw Ms Ntombana directly in front of the right hand front of his vehicle. He applied brakes immediately, but the collision occurred simultaneously. Ms Ntombana fell down on the tar surface of the road, in the lane in which Mr Zote had travelled, approximately between the center of his car and the right hand headlamp. Mr Zote said that he could not have travelled at more than 20km/h at the time of impact as he had just pulled away from a stationary position at the stop street.

[9] After the collision had occurred, he recounted that four or five persons who had been in the vicinity came to the assistance of Ms Ntombana and helped her to the side of the road where she sat down. There the police and the ambulance found her.

[10] Sergeant Boyce was the police official who attended at the scene of the accident. He did not open a docket as it appeared to him that Ms Ntombana did not sustain serious injuries, a perception which was later confirmed by the hospital staff upon his enquiry.⁴ He, accordingly, completed an accident report form which was tendered in evidence.

⁴ No evidence was presented of her injuries nor were any agreements reached in respect thereof. The evidence of Mr Zote, does, however, find support in the Plaintiff's Particulars of Claim. Although the plaintiff alleged a fracture of the tibial plateau she pleaded:

"8.1 Plaintiff was taken to the Humansdorp Hospital where X-rays were taken of her right leg and left wrist. Apparently, no broken bones were seen and she was discharged.
8.2 Plaintiff suffered severe pain while at home and she went back to the hospital after about five to six days. Further X-rays were taken which showed fractures. She was then referred to the Livingstone Hospital in Gqeberha."

[11] There were a number of deficiencies in the manner in which the report form had been prepared which were highlighted in cross-examinations of Sergeant Boyce. He did, however, corroborate the version of Mr Zote that the collision had occurred near the T-junction of Booyse Street and Jacobs Street and said that he had found Ms Ntombana on the side of the road approximately 11 meters from the stop sign at the T-junction. He recorded the version of the accident allegedly given to him by Mr Zote at the time in the accident report form as follows:

“According to driver A he turned right at the stop street at Booyse Street. The pedestrian then crossed the street and did not see the vehicle. He tried to stop but bumped the pedestrian. Slight injuries sustained.”

[12] The trial proceeded some twelve years after the accident and neither Ms Ntombana nor Mr Zote had attested to a statement at the time. The evidence of Ms Ntombana as to the events were vague and sketchy and Sergeant Booyse was constrained to acknowledge that he had little recall of the accident save for what he had recorded in his accident report form. Mr Zote, on the other hand, made a favourable impression in the witness box and Mr *Niekerk*, on behalf of the Ms Ntombana, was constrained to acknowledge at the conclusion of the trial that I was bound to accept that the collision occurred at the T-junction with Jacobs Street. Save for this concession, however, he urged me to accept her version as the manner in which the collision occurred. I do not think that the argument can be sustained.

[13] Her version of the place of the collision was anchored to the pedestrian crossing reflected on the photographs which she presented as depicting the scene. It is common cause that the pedestrian crossing is a significant distance away from the T-junction. Moreover, the probabilities favour Mr Zote's version that the collision occurred near the T-junction, which is considerably closer to the entrance of the school that Ms Ntombana intended to visit. There is no evidence of brake marks found on the tarred surface, which lends credence to Mr Zote's version that the collision occurred shortly after he had pulled away from a stationary position and that he was travelling very slowly at the time.

[14] Ms Ntombana insisted that she had been struck as she was leaving the road surface and that she had fallen down on the verge of the road where she was found later by the police and ambulance. As adumbrated earlier, Mr Zote says that she was assisted to the side of the road by bystanders who had come to her assistance. He was adamant and his evidence was consistent in this respect whilst that of Ms Ntombana may be accounted for by her admitted dizziness after the impact.

[15] As I have explained, Mr Zote made a favourable impression upon me in the witness box and although his evidence is not without blemish, he presented a clear version as the manner in which the collision occurred. I think that the probabilities favour his version. In any event the plaintiff bore the onus to establish that she would probably have succeeded in her claim against the RAF and the extent to which she

would have succeeded. The matter must accordingly be decided on the version presented by Mr Zote.⁵

[16] The plaintiff presented no evidence as to the nature of the taxi that she alighted from, but the evidence of Mr Zote was that it was a sedan vehicle. As Ms Ntombana crossed behind the vehicle, one would expect, in the ordinary course, that she would be visible to Mr Zote whilst seated in his vehicle at the stop street. By parity of reasoning he would have been visible to her. A pedestrian seeking to cross a street at a position where there is no pedestrian crossing has a duty to satisfy herself that she can proceed with safety. In *Swanepoel*⁶ Hiemstra J, correctly in my view, held that a pedestrian wanting to cross a road has the primary duty to make sure that he chooses an opportune time. She clearly did not do so and, on her own evidence, she neither saw nor heard the vehicle before the collision. Similarly, a driver proceeding on a suburban road has a duty to be vigilant for pedestrians who may cross the street.⁷ By his own admission Mr Zote did not see Ms Ntombana before the impact occurred and she had already crossed more than half the street. It follows that both Ms Ntombana and Mr Zote were negligent in failing to keep a proper lookout.

[17] Mr *Niekerk* urged me, nevertheless, to find that there was no contributory negligence on the part of Ms Ntombana. For this submission he relied on *Vilakazi*⁸. The circumstances in *Vilakazi* were, however, decidedly different. In *Vilakazi* the motorist emerged from a filling station on the right hand side of a busy road. Due to the

⁵ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-H

⁶ *Swanepoel v Parity Insurance Co. Ltd* 1963 (3) SA 819 (W)

⁷ *Sing v New India Assurance Co. Ltd* 1966 (4) SA 154 (D); and *Nogude v Union and South-West Africa Insurance Co. Ltd* 1975 (3) SA 685 (A)

⁸ *Vilakazi v Santam Assurance Maatskappy Beperk* 1974 (1) SA 23 (A)

pressure of the traffic he was unable to proceed until, eventually, one of the cars stopped to give him opportunity to enter the road and turn to the right. He looked to left and only saw one car approaching which he thought was at a safe distance, and he proceeded. At the same time a young woman had begun to cross the road from the opposite side. She too had looked to her right and seen the single motorist approaching and decided that it was safe to proceed. Due to the pressure of the traffic she had not noticed the vehicle emerge from the filling station.

[18] The facts of the matter have little in common with the present case. In this case the collision occurred in a quiet suburban street with little or no other traffic, and the insured vehicle was at all times travelling on the roadway and obeyed the traffic signs. As I have said, Ms Ntombana failed to keep a proper lookout. I am nevertheless satisfied that Mr Zote exhibited at least an equal degree of negligence. I consider that Ms Ntombana has established that, but for the negligence of Nel Mentz, she would have recovered 50% of her proven damages from the RAF.

[19] In the result, it is ordered that the defendant pay to the plaintiff:

1. An amount of R400 000 as and for damages;
2. Interest on the aforesaid amount at the prescribed legal rate calculated from the date of judgment to the date of payment; and
3. The plaintiff's costs of suit together with interest thereon calculated from a date fourteen days after taxation to date of payment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv D Niekerk instructed by Jock Walters Attorneys, Gqeberha

For Defendant: Adv P Jooste instructed by Nel Mentz Steyn Ellis Inc c/o John
Vosloo Attorneys, Gqeberha