THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 653/2016

In the matter between:

URSHA YVONNE FOURIE **APPELLANT**

and

RONALD BOBROFF & PARTNERS INC **RESPONDENT**

Neutral citation: *Fourie v Ronald Bobroff & Partners Inc* (653/2016) [2017] ZASCA 91 (7 June 2017)

Coram: Cachalia, Saldulker and Van der Merwe JJA and Coppin and Schippers AJJA

Heard: 17 May 2017

Delivered: 7 June 2017

Summary: Attorney: duty of an attorney to client: breach of mandate in respect of claim for damages for loss of earning capacity: damages not proved: absolution from the instance should have been ordered: appeal dismissed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Weiner J sitting as court of first instance):

1 The order of the court a quo is varied by substituting the dismissal of the appellant's claim with an order of absolution from the instance.

2 Save for paragraph 1 above, the appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Van der Merwe JA (Cachalia and Saldulker JJA and Coppin and Schippers AJJA concurring):

[1] The appellant, Ms Ursha Yvonne Fourie, instructed the respondent, Ronald Bobroff & Partners Incorporated, to claim damages from the Road Accident Fund (the RAF). Action was instituted against the RAF, but the matter was settled. The issues in this appeal are whether the respondent breached its mandate by failing to pursue a claim for loss of earning capacity in respect of the appellant and by undersettling the claims for general damages of the appellant and her minor son. They arose in the circumstances set out below.

[2] On 27 June 2005, the appellant, her husband (Mr Fourie), their son Lincoln (born on 12 November 1997) and their daughter Cayleigh (born on 26 August 2004) were involved in a motor vehicle collision that had tragic consequences. As a result of injuries sustained during the collision, Mr Fourie died on the same day and Cayleigh passed away about a month later on 27 July 2005. The appellant sustained physical injuries consisting of fractured ribs, a soft tissue neck injury, a soft tissue injury to her right shoulder, a clavicular fracture, haematomas to her right upper and lower leg and an

abdominal injury. She was admitted to hospital on the date of the collision, where she remained until 8 July 2005. Lincoln suffered soft tissue injuries to his neck, back and kidneys. He was examined in hospital immediately after the collision and sent home. Both the appellant and Lincoln of course suffered emotional distress and pain as a result of the loss of Mr Fourie and Cayleigh.

[3] During August 2005 the appellant instructed the respondent to claim damages on her and Lincoln's behalf from the RAF. The respondent specialises in personal injury claims. Since approximately the middle of 2007, Ms Philippa Jane Farraj, an attorney of some ten years' experience employed by the respondent, handled the matter. Summons against the RAF was issued during August 2007. The particulars of claim included claims by the appellant for loss of support, loss of income and general damages for pain and suffering, disability and loss of amenities of life, as well as claims on behalf of Lincoln for loss of support and general damages. The case was eventually set down for hearing on 1 August 2011.

[4] Approximately ten days before the trial date, Ms Farraj briefed counsel to appear for the appellant. By that time she had obtained medico-legal reports from Dr A Matisson (radiologist), Dr G Read (orthopaedic surgeon), Dr L Fine (psychiatrist), Ms M Ledwaba (occupational therapist) and Ms S Shaik (industrial psychologist). She had also obtained a report from an actuary, Mr Ivan Kramer. The RAF, in turn, obtained medico-legal reports from Prof Schepers (orthopaedic surgeon), Prof M Vorster (psychiatrist) and Mr S van Huyssteen (industrial psychologist).

[5] Mr Kramer only made calculations in respect of the claims for the loss of support. His report to the respondent was dated 8 July 2011. The calculations were made on the assumption that the appellant was unemployed and, had the accident not occurred, would never have been employed. He therefore calculated the loss of support from the date of the accident. Ms Farraj did not procure an actuarial calculation for the claim for loss of earning capacity.

[6] During the last couple of days before the trial date, Ms Farraj decided not to pursue the appellant's claim for loss of earning capacity. She explained in evidence how she had reached this conclusion. At the time of his death, Mr Fourie earned a salary of R11 066 per month. Applying contingency deductions to Mr Kramer's calculation of the appellant's claim for past and future loss of support, Ms Farraj arrived at the figure of R824 997. As I have said, the basis of that calculation was that the appellant would never have been employed. Ms Farraj then made what she termed a 'crude' calculation of the claim for loss of earning capacity.

[7] The crude calculation amounted to this. By 1 August 2011, the appellant's monthly salary amounted to R36 521. Ms Farraj accepted that the appellant would have continued working until she reached the age of 62½ years, that is, for another 18½ years. She multiplied the amount of R36 000 (the appellant's salary rounded off) by 12 months to reflect her annual income and multiplied that by 18½ years. That calculation gave a figure of approximately R7,9 million, taken as R8 million. She then made a deduction of 50%, to provide for capitalisation. She assessed the appellant's loss of earning capacity at 10% and thus calculated that the appellant could recover approximately R400 000 for loss of earning capacity. She concluded that it was more favourable for the appellant to pursue the claim for loss of support.

[8] By then the attorney for the RAF had made an offer of settlement in the amount of R1 million. For reasons that are difficult to fathom in light of the medico-legal reports available to it, the RAF made the offer on the basis that the appellant was unemployed and would remain unemployed for the rest of her life. On 29 July 2011, Ms Farraj and counsel consulted with the appellant for about an hour. The appellant rejected the offer of R1 million but gave a mandate to the respondent to settle the action for an amount of between R1,6 and R1,8 million.

[9] On the same day, the attorney for the RAF offered to settle the matter by payment of the following:

Loss of support in respect of the appellant	R	838 804,60
Loss of support in respect of Lincoln	R	323 509,00
Past medical and hospital expenses (appellant)	R	61 947,46
Past medical and hospital expenses (Cayleigh)	R	283 549,55
General damages (appellant)	R	200 000,00
General damages (Lincoln)	R	70 000,00
Total	R1	777 810,50

The offer was accepted on 29 July 2011 and the settlement was made an order of court on 1 August 2011.

[10] The appellant soon became dissatisfied with the settlement. On 27 September 2012 she caused summons to be issued against the respondent. As I have said, the appellant alleged that the respondent had breached the mandate given to it by failing to pursue her claim for loss of earning capacity and by accepting inappropriately low amounts for general damages in respect of herself and Lincoln.

[11] In amended particulars of claim the appellant alleged that she should have been awarded the amount of R650 000 for general damages and that Lincoln's general damages should have been assessed at R350 000. She further alleged that her claim for loss of earning capacity had been worth more than R5 million. The appellant maintained that she was nevertheless entitled to retain the amount of R838 804,60 that she had received for loss of support in terms of the settlement. She thus claimed payment of the amount of R5 777 108 from the respondent.

[12] The matter went to trial before Weiner J in the Gauteng Local Division, Johannesburg. She dismissed the appellant's action with costs, including the costs of two counsel, but granted leave to appeal to this court.

[13] The contract entered into between the appellant and the respondent was one of mandate. It is settled law that it was an implied term of the contract that the respondent was obliged to exercise the skill, knowledge and diligence expected of an average attorney that specialises in personal injury

claims.[1] A plaintiff suing for damages resulting from breach of a mandate is entitled to positive interesse, that is, payment of damages that places the plaintiff in the position that he or she would have been had the mandate been properly executed. Thus, the question is whether the appellant proved the alleged breach of the mandate as well as the amount she would have recovered from the RAF had the mandate been properly performed.

[14] The claim that the respondent breached the mandate in respect of the amounts accepted for general damages, may be dealt with briefly. The assessment of general damages is no exact science and is notoriously difficult. The amounts were accepted on the advice of experienced counsel. The analysis of comparable cases by the court a quo, which I find unnecessary to repeat, indicated that the amounts fell within reasonable bounds.

[15] I therefore turn to the appellant's case in respect of loss of earning capacity. This requires an analysis of the evidence available to Ms Farraj on 1 August 2011, in respect of the employment record and the intentions of the appellant before the accident and her employability thereafter. After the appellant had obtained a diploma in accounting, she worked as an accountant for a number of employers. She left her employment when she became involved in the Church of Jesus Christ of Latter-Day Saints (the Church). Before Cayleigh's birth the Church regularly appointed her on contract to do accounting work in respect of specific projects. But for the accident, she would have continued doing contract work for the Church until Cayleigh was four or five years old. She would have taken up fulltime employment by 2009 or 2010. She would have worked for the rest of her working life. As it happened, she was employed by the Church on contract since December 2005 and on fulltime basis from 1 October 2006. On 1 August 2011 she was still so employed, but intended to leave the employment of her own volition to operate a franchise for teaching mathematics to children.

[1] See *Mouton v Die Mynwerkersunie* 1977 (1) SA 110 (A) at 142H.

[16] During the trial the respondent introduced actuarial calculations made by Mr G A Whittaker. The appellant disputed the assumptions in respect of her employability on which the calculations were made, but otherwise accepted the correctness of the calculations. Mr Whittaker calculated that upon adjustment of Mr Fourie's earnings in line with inflation, it would, on 1 March 2011, have amounted to R15 721 per month. By then, as I have said, the appellant earned R36 521 per month. It follows that save for a claim for loss of support in respect of the period up to 2009/2010 when she would not have been employed on fulltime basis, the appellant suffered no loss of support. Mr Whittaker calculated this claim for loss of support over a longer period, namely from the date of the accident to 1 August 2011 and on the basis that she had no income during that period. He concluded that it amounted to R20 476, before deduction of contingencies. In respect of the period after the appellant would have taken up employment again, she could therefore only have a claim for loss of earning capacity.

[17] I therefore proceed to analyse the expert reports in respect of loss of earning capacity available on 1 August 2011. Dr Read said that it was reasonable to expect that even after the orthopaedic treatment he had recommended, the appellant would have had a 10 to 15% continued loss of productivity, without taking into account the psychological sequelae of the accident. He added:

'As to how this will affect her future income and employment potential, I defer to the opinion of the relevant experts in this field, also taking into consideration the psychological trauma she has experienced.'

His counterpart, Prof Schepers, did not dispute this. He said that it was possible that the appellant's productivity could have been diminished by her ongoing neck symptoms, but that that should be verified by her employer. Prof Vorster diagnosed the appellant with major depressive disorder. This was confirmed by her colleague, Dr Fine, who stated:

'Due to the severe trauma of having lost both her husband and her daughter, psychiatric prognosis for full remission of symptoms is not favourable, and she would be anticipated to feel some depression, worse at times, as an expression of grief for

the rest of her life. Deference is given to other opinions concerning loss of earnings and occupational capability.'

[18] Ms Shaik expressed the opinion that but for the accident the appellant was likely to reach the D1/D2 level of earnings on the Patterson scale by the time she reached retirement age. As a result of the consequences of the accident, the most likely scenario was that she would stagnate at the Patterson C5 level, even if she received the recommended treatment and responded positively to it. Ms Shaik summarised her conclusions as follows:

'Based on the experts opinion in the body of this report her orthopaedic injuries combined with her psychiatric conditions renders her as uncompetitive in the open labour market more especially if she loses her current job. The writer is of the opinion that post accident she documents a history of losses of earnings and difficulties coping with her job requirements as a result of physical and emotional problems. A full recovery from her orthopaedic injuries is not anticipated as she is likely to experience losses in productivity and combined with psychiatric problems (deference is given to a psychiatrist) should she lose her current job she will struggle to secure employment and she is likely to be employed on shorter term basis. However, the effects of the accident are likely to imply that she is unlikely to reach her pre-accident earnings.'

This was not disputed by the industrial psychologist appointed by the RAF, Mr Van Huyssteen.

[19] Thus, the medico-legal reports showed that the appellant had suffered a permanent impairment of earning capacity as a result of the orthopaedic and psychiatric injuries she had sustained. Both Ms Shaik and Mr Van Huyssteen were of the opinion that the extent of the impairment should be reflected in differential contingency deductions in respect of the pre- and post-accident scenarios of calculation of earning capacity.

[20] An attorney exercising the knowledge, skill and diligence required of the average specialist in personal injury claims, would soon have established that the appellant earned considerably more than her husband and that save for a brief period, she would have remained employed for the balance of her working life. That attorney would have realised that except for a relatively

small claim for loss of support, the appellant could only have a claim for loss of earning capacity. Simple logic dictates that claims for loss of support and loss of earning capacity cannot for the same period be determined on mutually exclusive factual assumptions. All of this was fairly conceded by counsel for the respondent.

[21] A prudent attorney in the position of Ms Farraj would upon examination of the available medico-legal reports have ascertained that the appellant did indeed suffer a permanent loss of earning capacity. In my view this conclusion rendered it imperative to determine the extent of the impairment. That should have been done by agreement between the experts of both parties or by obtaining and presenting evidence to this effect. The actuarial calculation of the monetary value of the impairment of earning capacity should have presented no difficulty.

[22] Ms Farraj made no attempt to have the extent of the impairment of the appellant's earning capacity expertly determined. She did not even consult with any of the experts. Instead she purported to determine the extent of the impairment by pure guesswork and compounded that by unscientific calculations. I am of the view that this conduct materially departed from the required standard and constituted a breach of mandate by the respondent.

[23] The next question is whether the appellant proved that she had suffered damages as a result of the breach of the mandate. In this case this requires proof that upon proper performance of the mandate, the appellant would have recovered more from the RAF in respect of loss of earning incapacity than she did recover for future loss of support. As I have shown, this, in turn, required expert evidence of the differential contingency deductions in respect of the position before and after the accident.

[24] Regrettably, as I shall show, the appellant bedevilled the assessment of whether she had suffered damages. She did so by failing to pursue a case or to present expert evidence on the extent of the partial impairment of her

earning capacity and by insisting that she was permanently unemployable in the open market as at 1 August 2011.

[25] This proposition is devoid of any evidential basis. On 1 August 2011 the appellant had been in fulltime employment since 1 October 2006. She intended to leave that employment to pursue the operation of a mathematics franchise, a prospect that she was excited about. Not only did she not inform any of the experts that she was unable to cope at work, but all of the experts found that she was indeed employable in the open market, albeit subject to some impairment.

[26] In her evidence the appellant confirmed the correctness of a summary of the appraisals of her performance at work, which was presented in evidence, together with the appraisals themselves, by a human resource manager of the Church. These appraisals indicated that the appellant's overall performance during 2007 had been rated just below the required standard. During 2008 she 'greatly exceeded' that standard and during 2009 she managed to exceed it. Her performance during 2010 was rated as exceptional and during 2011 she met the required standard. In the light of the objective evidence, the expert reports and the admitted appraisals, the lay evidence of Mr Rothman and Ms Harris, respectively the financial manager and a senior bookkeeper employed by the Church, that the appellant was unemployable in the open market, could carry no weight.

[27] The point is well illustrated by the history of the litigation against the respondent. In the original particulars of claim it was stated that the appellant had the capacity to earn not less than R31 000 per month as a bookkeeper/personal assistant, but that she had lost the capacity to earn between the ages of 50 and 60, that is, that she would have retired ten years earlier. In an actuarial report dated 12 September 2013, which the appellant furnished to the respondent, the appellant's claim was based on the assumption that she would have retired five years earlier, at age 57½ instead of age 62½. Only during opening address in the court a quo, did counsel for the appellant indicate that the appellant's case was that as at 1 August 2011

she had a complete loss of earning capacity. An amendment to that effect was effected on the following day.

[28] Mr Whittaker calculated the monetary value of the income that the appellant would have received but for the accident as well as her expected income as a result of her injuries. He made use of the different Patterson levels of earning recommended by Ms Shaik in respect of the two scenarios. He allowed a contingency deduction of 20% in respect of the first scenario. He found that upon making a 30% contingency deduction in respect of the second scenario, that is a 10% differential contingency deduction, the value of the appellant's loss of earning capacity, together with the aforesaid approximately R20 000 for past loss of support, would be more or less the same as the figure included in the settlement for loss of support. It follows that the use of an appropriate higher differential contingency deduction would have indicated that the appellant did suffer damages as a result of the breach of the mandate.

[29] It appears probable that a 10% differential contingency deduction is too low to accurately reflect the monetary value of the appellant's loss of earning capacity. And even though it is tempting to attempt to determine an appropriate percentage, I have, after mature consideration, come to the conclusion that an attempt by this court to do so, would amount to the same guesswork that the respondent was guilty of.[2] The same applies to the speculative submission of counsel for the appellant that a 70% differential contingency deduction should be applied. It follows that the appellant did not succeed in proving that she had suffered damages as a result of the breach of the mandate. In the result, the order of the court a quo must be varied to one of absolution from the instance, but should otherwise remain intact. This does not entitle the appellant to costs of the appeal.

[2] See *Mkwanazi v Van der Merwe & another* 1970 (1) SA 609 (A) at 631E-632H.

[30] The following order is issued:

1 The order of the court a quo is varied by substituting the dismissal of the appellant's claim with an order of absolution from the instance.

2 Save for paragraph 1 above, the appeal is dismissed with costs, including the costs of two counsel.

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C H G van der Merwe
Judge of Appeal

Appearances:

For the Appellant:	B Ancer SC (with him A Berkowitz) Instructed by: Norman Berger & Partners Inc, Highlands North McIntyre & Van der Post, Bloemfontein
For the Respondent:	D Mills SC (with him F Grobler) Instructed by: Gildenhuys Malatji Attorneys, Groenkloof Honey Attorneys, Bloemfontein