IN THE HIGH COURT OF SOUTH AFRICA REPORTABLE

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 1117/2019

Date Heard: 10-12 August 2021

Date Delivered: 7 September 2021

In the matter between:

TARQUIN JULIES Plaintiff

and

PETER McKENZIE t/a PETER McKENZIE ATTORNEYS Defendant

JUDGMENT

EKSTEEN J:

[1] To the plaintiff, Mr Tarquin Julies, the problem with the law has been lawyers. On 6 December 2008 he was shot in the face by a member of the South African Police Service (SAPS) with a shotgun. In consequence thereof, he lost one eye and all vision in the other. He instructed Masimla Attorneys (Masimlas) in Gqeberha to institute action against the Minister of Police (the Minister) for damages, which he had sustained in consequence of the injuries suffered in the shooting. Masimlas accepted the mandate, but failed to deliver, and they permitted the claim to prescribe. He thereafter instructed the defendant, Peter McKenzie Attorneys (McKenzies) in Gqeberha to issue summons against Masimlas for damages, which he had sustained in consequence of the

prescription of his claim against the Minister. They, too, accepted the mandate, but Mr Julies contended that they also permitted his claim against Masimlas, to prescribe. Hence, the present claim against McKenzies for damages arising from the prescription of the plaintiff's claim against Masimlas.

[2] At the commencement of the trial, by agreement between the parties, I ordered that the issue of McKenzies' alleged liability to Mr Julies be separated from the remaining issues in the matter. Consequently, in these proceedings, three issues arose for adjudication. Firstly, whether the shooting of Mr Julies was wrongful and unlawful (the first issue). Secondly, whether Masimlas had negligently permitted the claim against the Minister to prescribe (the second issue) and, thirdly, whether McKenzies had negligently permitted the plaintiff's claim against Masimlas to prescribe (the third issue).

[3] Mr Julies, who was 25 years old at the time of the shooting, is an unsophisticated man who had grown up in the northern suburbs of Gqeberha where he had successfully completed Grade 7 at school. He terminated his education due to financial constraints and he holds no other qualification. He lived with his mother at [. . .], Gqeberha (his home) and he said that he had been employed as a handyman before the shooting.

[4] On Saturday, 6 December 2008, Mr Julies and a few friends had been drinking at his home when two unmarked police vehicles arrived and parked in the street, approximately in front of his home. Two policemen in civilian clothes alighted from the cars whilst at least one, identified as Sergeant De Maar, remained in one of the police

vehicles. The two policemen entered his home. It is unclear what they did inside, but, shortly after entering they again emerged and proceeded to walk down the driveway to their cars. Mr Julies, standing outside in front of his home, demanded an explanation for their conduct inside the house and, as he did so, one of his friends threw a beer bottle at the police, which struck one of their vehicles. Mr Julies said that Sergeant De Maar had then alighted from the vehicle carrying a shotgun and shot at him, without uttering a word. He was struck in the face, which instantly rendered him unconscious and he only regained consciousness in hospital. Mr Julies is unaware of the events that occurred immediately after the shooting, but three of his friends were subsequently arrested and charged of public violence, assault and malicious injury to property. Although the incident was investigated and a police docket (the docket) prepared the charges were ultimately withdrawn.

[5] Mr Julies, as I have said, instructed Masimlas, early in 2009, to institute proceedings against the Minister. He had known Mr Masimla, who had assisted him previously in legal matters, before these events. Mr Julies testified that Mr Masimla had told him that this was a big case and that it would take very long. Although he met with Mr Masimla two or three times per annum after the initial instruction Mr Masimla never explained the delay. Rather, Mr Masimla always assured him that he was still busy with the case and that he would instruct an advocate to assist him. Mr Julies had no knowledge of litigation and he said that he trusted Mr Masimla.

[6] As adumbrated earlier, Mr Julies lost one eye, which had to be surgically removed, and all vision in the other. He had to undergo numerous surgical procedures from 2009 to 2015 in an endeavour to save his eyesight. All these procedures were conducted in the Provincial Hospital in Gqeberha at State expense save for the final procedure in October 2015, which was done at the Eye and Laser Clinic, a private institution in Gqeberha.[1] Because it was a private institution, he was concerned that they may look to him for payment. He, accordingly, contacted Mr Masimla to enquire about funds. Mr Masimla did not provide him with a satisfactory response and, he said, he went to see him when he was discharged from hospital in November 2015. To his dismay, Mr Masimla told him that he is not pursuing any claim on his behalf and that he has no file in respect of such litigation. Thus, Mr Julies said, he first discovered that Mr Masimla had not prosecuted his claim. He could not believe it.

[7] After the lapse of some time, he said three months, he was advised to approach the SAPS Civil Litigation Centre at Mount Road Police Station (Mount Road) to verify that no claim had been lodged in his name.[2] A police captain at Mount Road handed to him a written note confirming that no claim had been instituted in his name and advised that he should see an attorney. Accordingly, on 15 August 2016 he instructed McKenzies.[3] Mr Julies handed the handwritten note, which he had received at Mount Road, to Mr McKenzie.

[1] A statement of account from the anaesthetist confirmed that the procedure was performed on 20 October 2015.
[2] It is common cause on the pleadings that he in fact attended at the Mount Road Police Station on 11 July 2016.
[3] Mr McKenzie testified that the plaintiff first came to see him late in July 2016. It is, however, admitted that he accepted the instruction from Mr Julies on 15 August 2016.

[8] There was some dispute between the parties as to the instructions that had been given to Mr McKenzie. Mr Julies said that he had told Mr McKenzie of his meeting with Mr Masimla in November 2015 when he was advised that Masimlas had not prosecuted his claim. He also told him that he had been to Mount Road to confirm this fact. Mr McKenzie denied, however, that he was advised of the meeting in November 2015. He said that Mr Julies had instructed him that he had first learnt of Mr Masimlas failure when he attended at Mount Road on 11 July 2016. He accordingly contended that prescription of the claim against Masimlas started to run on 11 July 2016.[4] I shall revert to this issue.

[9] Mr Julies' relationship with McKenzies, too, was not fruitful. By December 2019 he had lost faith in Mr McKenzie and he approached his current legal representative, Mr Skelton, and terminated McKenzies' mandate. Mr Skelton's endeavours to obtain a copy of McKenzies' file rendered very little success. All that he ever received were two letters from Masimlas, which evidenced their acceptance of the mandate given to them. Mr McKenzie testified that he also had a copy of a contingency fee agreement signed by Mr Julies on 15 August 2016, which had been misfiled, and that was provided to Mr Skelton at a pre-trial conference shortly before the trial. He candidly admitted that he had never obtained a power of attorney from Mr Julies and he said that the remainder of the contents of his file, including all the file notes that he had, had been lost. The loss of the file content occurred, he said, when he moved offices at the end of August 2017. He explained that his brother-in-law helped him to carry files when a gust of wind blew the content of several

[4] During cross-examination, Mr McKenzie was constrained to acknowledge that he had been instructed that Mr Masimla had admitted his failure to Mr Julies before he went to the Mount Road Police Station. However, he contended that Mr Julies had said that it had occurred a few days before 11 July 2016.

files away. They retrieved all the documents that they were able to gather, but some were beyond their reach. The note received from Mount Road, dated 11 July 2016, Mr Julies' hospital cards and all McKenzies' file notes were among the documents that were lost. When he was pressed under cross-examination, Mr McKenzie acknowledged that he had not attended to the file at all after August 2017.

[10] I turn to consider the merits of the plaintiff's claim. In respect of the first issue, the defendant admitted that Mr Julies had been shot by Sergeant De Maar, but denied that it had been wrongful and unlawful. They pleaded:

> "2.1 … according to the police, the plaintiff was part of a group of guys, who unlawfully attacked the police on 6 December 2008 by throwing dangerous objects such as empty bottles directly at Sergeant H De Maar and his colleagues.
>
> 2.2 Upon being struck with a bottle, Sergeant H De Maar used reasonable and necessary force to defend himself against the plaintiff and his group of assailants by firing a shot with his shotgun."

[11] Mr *Ford*, on behalf of McKenzies, argued that there was an obligation on Mr Julies to adduce credible evidence in order to sustain the viability of his claim against the Minister. The argument proceeded that his evidence was inconsistent, improbable and lacking in credibility and that I should be hesitant to accept it. Mr Julies, as I have explained, is an unsophisticated man of modest education who has suffered greatly over an extended period and was testifying to events which occurred more than 12 years before. It is true that his evidence was not without blemish, however, I did not form the

impression that he attempted to mislead me. It was, as I have said, admitted that Sergeant De Maar had shot him and that the criminal proceedings against his friends relating to the alleged public violence, assault and malicious injury to property were withdrawn. He was never charged. The inconsistencies in his evidence on the issue of the shooting were of little or no consequence and, in the absence of evidence to the contrary, I do not consider that his evidence was not worthy of acceptance.

[12] In any event, a shooting, like every other infringement of the bodily integrity of another, is *prima facie* unlawful. Thus, whereas the shooting of Mr Julies was admitted, the onus to establish the excuse or justification, in this case self-defence, would have rested on the Minister.[5] Although Mr Julies was cross-examined in respect of a statement in the docket, allegedly made by Sergeant De Maar, De Maar did not testify. Accordingly, no justification for the shooting was established. Consequently, the uncontested evidence demonstrates a strong probability that Mr Julies' case against the Minister would have succeeded. The first issue must therefore be determined in Mr Julies' favour.

[13] The second issue is whether Masimlas had negligently caused Mr Julies' claim against the Minister to prescribe and therefore to become unenforceable. The liability of an attorney to a client for damages resulting from the attorney's negligence is based on breach of the 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

[5] *Mabaso v Felix* 1981 (3) SA 865 (A), [1981] 2 All SA 306 (A); *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), [1993] 2 All SA 232 (A); and *Moghamat v Centre Guards CC* [2004] 1 All SA 221 (C).

practising attorney.[6] Where an attorney falls short of this standard, he commits a negligent breach of his mandate.

[14] 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;

(d) damages, which would generally require proof of the likelihood of success in the aborted proceedings[7]; and

(e) that damages were within the contemplation of the parties when the contract was concluded.[8]

[15] As I have said, Masimlas accepted a mandate from Mr Julies during February of 2009 to institute action on his behalf against the Minister for damages sustained as a result of the shooting and they failed to do so. However, Mr McKenzie denied that Masimlas had negligently permitted the plaintiff's claim to prescribe.[9] He contended that

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[6] *Mouton v Die Mynwerkersunies* 1977 (1) SA 119 (AD), [1977] 1 All SA 242 (A); *Jowell v Bramwell-Jones* 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 & Orsmond Inc and Another v Gajjar NO* [2017] ZASCA 169 (SCA), 2018 (3) SA 353 (SCA), [2018] 1 All SA 344 (SCA).

[7] *Dhooma v Metha* 1957 (1) SA 676 (N)

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

[9] The period prescription in respect of the claim, as determined by s 11(d) of the Prescription Act, 68 of 1969, is three years.

during (or about) 2010/2011, and before the prescription of the claim against the Minister, Mr Masimla had advised Mr Julies that he was not proceeding with his claim against the Minister. Mr Masimla did not testify and there was no evidence in support of this contention. During argument before me Mr *Ford,* correctly in my view, acknowledged in the circumstances, that he was not able to make any submissions in respect of that issue. The ineluctable conclusion to which one is driven is accordingly that Masimlas breached their mandate in negligently permitting Mr Julies' claim against the Minister to prescribe by failing to commence proceedings within three years from the date of the shooting. As I have demonstrated, the evidence established that the plaintiff's claim against the Minister had good prospects of success and, by the very nature of the mandate given to Masimlas, damages must have been within the contemplation of the parties at the time of the conclusion of the contract in the event of the negligent prescription of the plaintiff's claim. The second issue, too, must therefore be resolved in favour of Mr Julies.

[16] That brings me to the third issue, the claim against McKenzies. They admitted that, on 15 August 2016, they accepted a mandate to proceed with a claim against Masimlas for allowing Mr Julies' claim against the Minister to prescribe and that they did not carry out the mandate. However, McKenzies, firstly, denied that they had negligently breached their mandate and, secondly, contended that their failure to issue summons was not the cause of the damages allegedly suffered by Mr Julies.

[17] In respect of the first of these defences, the essential issue relates to when prescription of Mr Julies' claim against Masimlas began to run. At the heart of the dispute

lies the application of s 12 of the Prescription Act, 68 of 1969 (the Act). The material portion of the section provides:

> "12 When prescription begins to run
> (1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
> (2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.
> (4) …"[10]

[18] It is settled law that the party raising prescription bears the onus to prove the date of inception of the period of prescription.[11] Mr Julies contended that McKenzies had permitted his claim against Masimlas to prescribe and become unenforceable in law. He therefore bore this onus.

[19] A debt is considered to be due, as envisaged in s 12 (1) of the Act, when it is immediately claimable by the creditor in legal proceedings and the debtor is under an obligation to perform.[12] Accordingly, it was not in dispute, the "debt" arising from the

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[10] Subsection 12(4) relates to a debt based on the commission of an alleged sexual offence and finds no application to the facts of the present case.
[11] *Gericke v Sack* 1978 (1) SA 821 (A), [1978] 2 All SA 111 (A); and *Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore NO and Others* [2015] ZASCA 37. In terms of s 10(1) and 11(d) of the Prescription Act the debts, being the plaintiff's claims, would be extinguished by prescription after the lapse of three years in each case.
[12] *Benson and Another v Walters* 1984 (1) SA 73 (A) at 82, [1984] 1 All SA 283 (A); *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA), [1998] 1 All SA 140 (A); and *Trinity Asset Debt Management Pty Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC), 2017 (12) BCLR 1562 (CC).

shooting was due on the date of the incident and would, but for s 12(2) and (3) of the Act, have been extinguished by prescription on 5 December 2011.[13] Ordinarily Mr Julies' claim against Masimlas would therefore have fallen due on 6 December 2011.

[20] However, Mr Julies, reliant on s 12(2) of the Act, contended that prescription of his claim against Masimlas only commenced to run in November 2015 when he first learnt of Mr Masimla's breach of his mandate.

[21] In response, McKenzies sought to rely on s 12(3). It was their primary contention that by the exercise of reasonable care Mr Julies could have acquired knowledge of the identity of his debtor, Masimlas, and the facts from which the debt against them arose, before 14 August 2013. Consequently, they alleged that the claim against Masimlas had already prescribed prior to 15 August 2016 when McKenzies accepted the mandate to act on behalf of Mr Julies.

[22] In the alternative, McKenzies relied on the note from Mount Road dated 11 July 2016, which was handed to Mr McKenzie at his first meeting with Mr Julies. McKenzies contended that it was only on 11 July 2016 that Mr Julies was advised and discovered that Masimlas did not prosecute the claim against the Minister. They denied, as I have said, that Mr Julies had disclosed to them that Mr Masimla had already informed him in November 2015 that he had not instituted the claim. Thus, McKenzies contended that prescription of the claim against Masimlas only commenced to run on 11 July 2016. As

[13] Section 10(1) and s 11(d) of the Prescription Act.

adumbrated earlier, McKenzies' mandate was terminated in December 2019, less than three years thereafter. Hence, the allegation that McKenzie's failure to issue summons was not the cause of damages suffered by Mr Julies.

[23] As I have recorded, Mr Masimla did not testify and the only version of the interaction between him and Mr Julies is the evidence of Mr Julies that he was advised that the case would take very long and that he was repeatedly assured, until November 2015, that the matter was being attended to. Whilst it is a sad indictment on our legal system, in reality, many cases do take years to come to trial. This is particularly so in delictual claims where the medical condition of the victim may not have stabilised, as the case was for Mr Julies. In such circumstances, I am unable to find that it was unreasonable for him to trust his legal representative when such assurances were given.

[24] In *Links*[14] the Constitutional Court said, in respect of s 12(3) of the Act, in a medical negligence case:

> "It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. That in turn requires that the litigant is in possession of sufficient facts to cause the reasonable person to suspect that something has gone wrong and to seek advice."

[14] *Links v Department of Health, Northern Province* [2016] ZACC 10 (CC), 2016 (4) SA 414 (CC) at para [47], 2016 (5) BCLR 656 (CC).

[25] Mr Julies did not know of the existence of the debt (i.e that his claim had not been instituted) nor was there any reason to suspect that something had gone wrong before it was revealed to him in November 2015. In the absence of an explanation from Mr Masimla one is driven to the irresistible conclusion that his repeated assurances were directed at willfully preventing Mr Julies from coming to know of the existence of the debt which arose from the prescription of his claim.

[26] Much was made, during argument before me, of the evidence of Mr Julies that he had approached Mount Road about three months after Mr Masimla had advised him that the claim against the Minister had not been instituted. According to Mr McKenzie, the note confirming the date had gone with the wind, but he did allege that the visit to Mount Road was on 11 July 2015 and that the note bore that date. Mr Julies, in a replication, admitted this. It was formally admitted and it was not permissible for either party to attempt to disprove it.[15] However, Mr *Ford* argued that I should find, on the strength of this evidence, that Mr Julies was unreliable in his recall of dates and that it was equally probable that he may only have met with Mr Masimla in April 2016, being three months prior to 11 July.

[27] The argument cannot be sustained. Mr Julies was consistent in his evidence that Mr Masimla's admission was made in November 2015. He recalls the date because he had had contact with Mr Masimla while he was in hospital awaiting a procedure to be

[15] Section 15 of the Civil Proceedings Act 25 of 1965 provides: "It shall not be necessary for any party in civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings."

performed at the Eye and Laser Clinic. This was the only surgical procedure not performed in a State hospital and it was the only time that he was concerned about the possible bills. Upon being discharged from hospital in November 2015, he said, he approached Mr Masimla. The date of the procedure at the Eye and Laser Clinic was established by objective evidence, in the form of a statement of account from the anesthetist, to have been on 20 October 2015. As I have said, I did not form the view that Mr Julies may be deliberately misleading me and I consider that his evidence in this regard is credible.

[28] Mr *Ford* contended further that it is improbable, if Mr Julies did obtain knowledge of Mr Masimla's failure in November 2015, that he would have waited until July 2016 to take any further steps. The lapse of time must be considered in the context of the proven facts of the case. Mr Julies' intellectual, financial and physical constraints have been recorded earlier. He had no knowledge or experience of civil litigation and he explained that he only learnt of the SAPS Civil Litigation Centre through a friend who, in turn, knew a lady employed by the SAPS. In these circumstances, I do not consider this improbability, such as it is, to be destructive to his version. In any event, where there is direct, credible evidence, as I have found that there was, a court may accept such evidence even where it conflicts with probabilities arising from human experience or expert opinion.[16] The uncontradicted evidence of Mr Julies must therefore be accepted in respect of the meeting in November 2015. As adumbrated before, it was common cause that the approach to Mount Road occurred on 11 July 2016 and, absent an

[16] *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (E) at 436H, [1984] 4 All SA 454 (E).

amendment to the pleadings, this fact was not open to challenge. In the circumstances, I consider that Mr Julies was clearly mistaken when he said that it was three months after he had seen Mr Masimla. His estimation is made five years after the event, purely from memory, and was unsupported by any proven facts.

[29] To summarise, the evidence established that Mr Julies had repeatedly been advised, before November 2015, that Masmilas was attending to his claim, which he had been told would take a very long time. He trusted his attorney, as he was entitled to do. He was therefore unaware of the existence of the debt (ie. a claim against Masimlas) as Mr Masimla had willfully prevented him from coming to know of it by his repeated assurances. Mr Julies did not possess any facts, which might have caused a reasonable person to suspect that something had gone wrong[17], in this case, that his claim was not being pursued. In the circumstances s 12(3) of the Act could not arise.

[30] I pause to record that when Mr Julies closed his case, Mr *Ford* applied for an order that McKenzies be absolved from the instance. I dismissed the application and I indicated that I would provide my reasons for doing so in this judgment. The argument was again alluded to at the conclusion of the trial and it is convenient to address it now.

[31] It arises from the judgment in *Gore*.[18] Mr Gore, in his capacity as a liquidator of a company in liquidation, had claimed damages from the Minister of Finance and the Western Cape Government for the company's loss arising from it not having been

[17] *Links* at para [47]
[18] *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA), [2007] 1 All SA 309 (SCA).

awarded a government tender as a result of fraud by certain provincial administration officials. They had manipulated the tender process in such a way as to ensure the award of the tender to a company in which they held an undisclosed interest. The Minister and the Western Cape Government raised the defence of prescription.

[32] When the award of the tender was announced in April 1994, the company had immediately suspected impropriety and cried foul. They repeatedly contended that the adjudication of the award process had been tainted by fraud, but they had no factual information to substantiate these assertions. It was only in February of 1997 that the company found sufficient evidence that improper means had been used to obtain the tender and it served its summons in January 1999. The question, which arose for adjudication was whether the plaintiff had "knowledge" of "the facts from which" the debt arose before 15 January 1996.

[33] The Supreme Court of Appeal (SCA) recognized that a company official cried fraud soon after the tender was lost. It proceeded to hold:

> 'But what did he know when he did so? The defendants' argument seems to us to mistake the nature of "knowledge" that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified true belief. Belief, on its own, is insufficient. Belief that happens to be true … is also insufficient. For there to be knowledge, the belief must be justified.'

[34] On behalf of McKenzies, it was contended that Mr Julies had said when he was told in November 2015 that no claim had been instituted, he did not believe Mr Masimla. Thus, the argument proceeded, he had a mere suspicion and that the "facts" from which the debt arose were only established on 11 July 2015 at Mount Road. I do not consider there to be any merit in the submission nor does it find support in *Gore*. Whilst it is true that belief, on its own, is insufficient without knowledge of the facts justifying such belief, it does not follow that knowledge of the facts, which gave rise to the debt, without belief, is insufficient. Section 12(3) of the Act is not concerned with "belief", it relates only to "knowledge". The admission by Mr Masimla would have caused any reasonable person to think that something has gone wrong, as described in *Links*.[19] It triggered an obligation to obtain knowledge of the facts from which the debt arose. Mr Julies could immediately have consulted any other attorney, which would have revealed the true facts. He could not postpone the commencement of the running of prescription by his failure to do so.[20] In the result, I conclude that Mr Julies did discharge the onus of establishing that the inception of the prescriptive period was in November 2015.

[35] By then he knew the identity of Mr Masimla, as his debtor, and he knew, or was deemed by s 12(3) of the Act, to know that no claim had been instituted on his behalf. These facts were sufficient to institute action.

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[19] *Links* para [47]

[20] *Gunase v Anirudh* 2012 (2) SA 398 (SCA) at para [14] and following; *Leketi v Tladi NO and Others* [2010] 3 All SA 519 (SCA) at para [18].

[36] Reverting to the evidence in this matter, there was a substantial dispute as to whether Mr Julies had in fact advised McKenzies of his meeting with Mr Masimla in November 2015. I do not consider that it is necessary to resolve this dispute. Prescription of the claim against Masimlas began, as a matter of law, to run in November 2015 and the claim prescribed in November 2018, prior to the termination of Mr McKenzie's mandate. The claim accordingly prescribed as a result of Mr McKenzie's failure to issue summons timeously. On his own admission, he was negligent in his conduct of the matter. In two and a half years he had never obtained a power of attorney from Mr Julies, he did not obtain a copy of the docket, nor any medical reports. He acknowledged that he had not attended to the file since the content was blown away in August 2017. I am satisfied that he negligently breached his mandate and that the claim prescribed as result thereof.

[37] Even if Mr Julies had advised him that he first learned of Mr Masimla's failure on 11 July 2015, it cannot alter either the date upon which prescription began to run or the date of its completion. It may, in appropriate circumstances, have founded an estoppel. The essence of the doctrine of estoppel is that a person is precluded (or estopped) from denying the truth of the representation previously made to another if the latter, believing in the truth of the representation, acted on the representation to his own determent. However, estoppel cannot arise unless it is pleaded and the essentials thereof proved.[21] No estoppel was pleaded nor was there evidence to suggest that Mr McKenzie had delayed the issue of summons relying upon a communication made by Mr Julies. On the

[21] *Blackie Swart Argitekte v Van Heerden* 1986 (1) SA 249 (A) at 260, [1986] 1 All SA 373 (A); *Absa Bank Limited v IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA), [1997] 2 All SA 307 (A).

contrary, the evidence, as I have said, suggested that throughout the duration of his mandate, Mr McKenzie never obtained a power of attorney from Mr Julies and, at least from August 2017 to December 2018, he did not attend to the file at all. In the circumstances I conclude that the plaintiff has established that his claim against Masimlas prescribed as a result of the negligent breach of the mandate accepted by Mr McKenzie.

[38] In the result, the following order will issue:

(a) The defendant is ordered to pay to the plaintiff such damages as the plaintiff is able to prove that he has suffered in consequence of the shooting which occurred on 6 December 2008; and

(b) The defendant is ordered to pay the plaintiff's costs of suit.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv D Niekerk instructed by Vic Skelton Inc, Port Elizabeth

For Defendant: Adv EAS Ford SC instructed by Joubert Galpin Searle, Port Elizabeth