Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 21/2012

CASE NO: 22/2012

In the matter between:

MARGARET MAAMOGWA 1st Plaintiff

MARIA MAAMOGWA 2nd Plaintiff

and

SEGALO EPHRAIM MONARE Defendant

DATE OF HEARING : 01 AUGUST 2017

DATE OF JUDGMENT : 10 AUGUST 2017

COUNSEL FOR THE PLAINTIFFS : MR NJAU

COUNSEL FOR DEFENDANT : MR MONARE

REASONS FOR JUDGMENT

HENDRICKS J

Introduction

[1] Margaret and Maria Maamogwa are sisters. On the 10th December 2004 they were passengers in a van (bakkie) travelling from Mahikeng to Logagane. *En route* near Makgobistad the van overturned and they sustained physical injuries. They were hospitalised, first at Bophelong Hospital and thereafter at Victoria Private Hospital, in Mahikeng. After their discharge from hospital they recuperated at home, although until the present day they are still not completely healed. They are still experiencing pain and discomfort.

[2] On 20th January 2015 and upon being referred, they went to the offices of the defendant who is a practising attorney and practising as such under the name and style of S. E. Monare & Partners. They paid an amount of R350.00 as consultation fee. A certain unknown gentleman who acted as receptionist, issued a receipt for the said amount.

[3] He asked them how the accident occurred. They explained. He then informed them that they don't have a claim against the Road Accident Fund because they were ferried in a van. A van according to him is meant to transport goods and not people. Disillusioned and frustrated about the advise given, they decided to leave. They also left the matter there.

[4] During 2010, some five (5) years later, one Tiki who was acting as an agent for the firm of attorneys Röntgen & Röntgen Incorporated, informed the plaintiffs that they should consult with a certain Mr Röntgen. A meeting was set up in Mahikeng. After consultation, they instructed the firm of attorneys Röntgen & Röntgen to institute action against Mr Monare (the attorney) of the firm of attorneys S. E. Monare & Partners.

[5] Summonses were issued out of the High Court, Mahikeng under case numbers 21/2012 and 22/2012 in the names of Margaret and Maria respectively, against Mr S. E. Monare. These two matter were set down on the same date for hearing as the facts and cause of actions are similar. The particulars of claim attached to the summonses are identical. The cause of actions are based on the premises that they instructed the defendant to act on their behalf and to claim compensation form the Road Accident Fund and those responsible in respect of the accident and the injuries they sustained, which resulted in damages suffered. They alleged that the defendant accepted their mandate.

[6] According to the plaintiffs, they discovered towards the latter part of the year 2010 that the defendant had either failed, refused and/or neglected to lodge their claims with the Road Accident Fund. Their claims with the Road Accident Fund had prescribed. As a result of this, it is alleged that they suffered a loss, for which the defendant is liable

to compensate them. A total amount of R1 170 000.00 together with interest at the rate of 15.5% per annum is claimed by each of them as damages.

[7] The defendant raised a special plea of prescription. However, at the commencement of the trial, Mr Monare (the defendant) abandoned the special plea. The evidence of Margaret and Maria as the two plaintiffs were led. At the close of the case for the plaintiffs, an application for absolution from the instance was made. This Court granted absolution from the instance with costs and stated that reasons for the order will follow. These are the reasons for the order granted on 01 August 2017.

[8] The question to be decided is whether the plaintiffs indeed instructed Mr Monare, the attorney, to act on their behalf and to institute an action against the Road Accident Fund. From the evidence tendered by both plaintiffs, it is abundantly clear that they paid the amount of R350.00 as a consultation fee. This amount is not a deposit for the attorney to act on their behalf.

[9] Furthermore, was it also the evidence of both plaintiffs that they did not consult with Mr Monare, the attorney. On the evidence of Margaret, a certain gentleman helped them and they did not asked for his name. According to Maria it was the receptionist who took the money, issued the receipt and informed them, after listening to their version of how

the accident occurred, that they do not have a case. They did not insist on consulting with Mr Monare, the attorney, nor do they know Mr Monare. There is a huge difference between consulting an attorney and instructing or mandating an attorney to act on behalf of a litigant. Mr Monare was not consulted not instructed or mandated to act on behalf of the plaintiffs.

[10] In paragraph 12 of the particulars of claim attached to the summons, the following damages are claimed in each case under these respective headings:

Estimated future medical expenses:	R300 000.00
Past loss of salary:	R120 000.00
Estimated future loss of income:	R200 000.00
General damages:	
▪ for shock, pain and discomfort:	R200 000.00
▪ general disability:	R150 000.00
▪ loss of amenities of life:	R200 000.00
Total	R1 170 000.00

[11] These amounts are claimed for each of the two plaintiffs, Margaret and Maria. The merits and quantum in these actions were not separated. No evidence was presented to substantiate the quantum of damages suffered by each of the plaintiffs. Margaret was employed as a cleaner

in the employ of the Department of Public Works whilst Maria was a primary school principal. No evidence was lead with regard to their earnings or the loss thereof. No expert evidence was presented to quantify their respective claims for damages.

[12] If there is at the close of the case for the plaintiff no evidence upon which a court may or might find in favour of the plaintiff, then absolution from the instance may be granted. When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. The effect of the granting of absolution from the instance at the close of the case on behalf of the plaintiff is that the plaintiff's case is dismissed.
See: **Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (AD).**

[13] In **Gordon Lloyd Page & Associates V Rivera And Another** 2001 (1) SA 88 (SCA) the following is stated:

> *"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G - H in these terms:*
>
> *'. . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is*

> *not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)'*

This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G - 38A; Schmidt Bewysreg 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (Gascoyne (loc cit)) - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice. Although Wunsh J was conscious of the correct test, I am not convinced that he always applied it correctly although, as will appear, his final conclusion was correct."

See also: **De Klerk v ABSA Bank Ltd and others** 2003 (4) SA 315 (SCA).

[14] The order of absolution from the instance was granted with costs. The effect thereof is that the plaintiffs should pay the costs of the defendant. As a result of the fact that the two actions were not consolidated into one action, Margaret and Maria are ordered to pay the costs of the defendant in the two separate actions, respectively. This costs order was granted in favour of the defendant because there is no plausible reason why costs should not follow the result and be awarded to the defendant as the successful litigant.

It is for the aforementioned reasons that I granted the order of absolution from the instance with costs on the 01st August 2017.

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R D HENDRICKS
ACTING DEPUTY JUDGE PRESIDENT
NORTH WEST HIGH COURT, MAHIKENG