IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 380/2013

In the matter between:

M. A. J. Appellant/Plaintiff

(Identity Number: [8...])

and

JOHANNES PETRUS LOUIS GRIMBEEK Respondent/Defendant

HEARD ON: 13 FEBRUARY 2017

JUDGMENT BY: RAMPAI, J, VANZYL *et* MHLAMBI, J

DELIVERED ON: 11 MAY 2017

[1] These are appeal proceedings. The appeal concerns the decision of a retired colleague who upheld the respondent's special plea of prescription with costs. Aggrieved by that decision, the appellant comes to us on appeal with the leave of the court a *quo.* The respondent opposes the appeal.

[2] I deem it necessary to give some historical background of the appeal. From now on I shall refer to the appellant as the plaintiff and the

respondent as the defendant unless the context dictates otherwise.

[3] On [….] 1983 the plaintiff was born. He grew up at Parys. He started his school career at Tumahole in that town. From a primary school he preceded to Tlali Secondary School. He was a grade 9 learner in the year 2001.

[4] On 25 January 2001 the plaintiff was involved in a road accident at Parys. The scene of the accident was in Brown Street, Tumahole, Parys. It took place at± 18:00. He was a cyclist at the time. The bicycle collided with a motor vehicle described as an ambulance. He sustained certain bodily injuries in the accident. He was rushed to Parys Hospital.

[5] On the same day, 25 January 2001, the plaintiff was transferred to Boitumelo Hospital at Kroonstad. The diagnosis revealed that he sustained certain fractures. He was hospitalised for ten or so days. He subsequently visited the Boitumelo Clinic on several occasions for further treatment as an out-patient.

[6] On 23 February 2001 the plaintiff's father consulted the defendant and mandated him to lodge the plaintiff's third party claim against the Road Accident Fund on behalf of his minor son. The defendant tendered to provide the required legal services in order to recover compensation for delictual damages suffered by the child.

[7] On 4 February 2013 the plaintiff caused the summons to be issued against

the defendant. He sued the defendant for payment of the sum of R1260000. The claim was based on professional negligence. He alleged that, through extinctive prescription, he lost his statutory right to recover compensation directly from the Road Accident Fund. He then asserted that his loss **was a** direct and necessary consequence of the defendant's acts of neglect.

[8] This completes my synoposis of the historical backdrop. These material facts were extrapolated from the plaintiffs pleadings. Let us now turn to the other side of the coin.

[9] On 6 February 2013 the sheriff served the plaintiffs summons on the defendant personally. He filed notice of his intention to defend the action. In due course the defendant's plea was also filed. The plea was amended on 16 May 2013 and filed. The defendant simultaneously filed a special plea together with his substantive plea.

[10] The special plea was couched in the following terms:

> "1.1 Die Eiser se eis teen die Verweerder spruit voort uit die beweerde nalate/versuim van die Verweerder om 'n eis namens die Eiser in te stel teen die Padongelukfonds voortspruitend uit 'n botsing wat na bewaring plaasgevind het op 25 Januarie 2001 (hierinlater na verwys as "die derdeparty-eis)".
>
> 1.2 Dagvaarding is op die Verweerder beteken op 6 Februarie 2013.
>
> 1.3 Die Eiser veer aan dat hy opdrag gegee het aan die Verweerder om die derdeparty-eis in te stel kort nadat die voormelde botsing op 25 Januarie 2001 plaasgevind het.

1.4 Die Eiser het meerderjarig geword op 17 Desember 2004.

1.5 Die Eiser het kennis gedra van die identiteit van die Verweerder en van die feite waaruit die Verweerder se beweerde skuld ontstaan het voor 7 Februarie 2010.

1.6 In die alternatief tot paraqraaf 1.5 hierbo kon die Eiser deur die beoefening van redelike sorg kennis van die identiteit van die Verweerder en van die feite waaruit die Verweerder se beweerde skuld ontstaan het bekom het voor 7 Februarie 2010 en word die Eiser ingevolge Artikel 12(3) van die Verjaringswet, Wet no 68 van 1969 geag sodanige kennis te gedra het voor 7 Februarie 2010.

1.7 In die vooropstelling het die Eiser se eis teen die Verweerder verjaar ingevolge die bepalings van *inter alia* Artikel 10(1), 11(d). 12(1) en 12(3) voordat dagvaardiging op die Verweerder beteken is op 6 Februarie 2013."

[11] On 10 April 2014 and prior to the hearing the parties held a telephonic pre-trial conference. They agreed to ask the court to adjudicate the merits first. Later on the issues were accordingly separated. All those relative to *quantum* were shelved.

[12] The court a *quo* considered the evidence and made the following order on 29 July 2014:

"[26] **BEVEL**

1. Die spesiale pleit van verjaring word met koste gehandhaaf.
2. Die eis word met koste van die hand gewys."

[13] On 21 August 2014 the plaintiff filed notice of application for leave to appeal. The grounds of appeal were embodied in the same notice. There

were 17 comprehensive grounds. I shall revert to some of them later.

By agreement between the parties the court a *quo* dispensed with the formal hearing of oral argument of the application for leave to appeal. It considered written heads of argument and adjudicated the application informally in chambers. On 23 October 2014 the court a *quo* granted the plaintiff leave to appeal and reserved cost of the application as cost in cause.

[14] On 20 November 2014 the plaintiff's notice of appeal was filed.

He noted an appeal against the whole of the judgment and the order by the court a *quo* delivered on 29 July 2014. The relief sought by the appellant is threefold. He seeks to have the order reversed by dismissing the respondent's special plea, granting judgment with cost against the respondent and upholding the appeal with cost.

[15] On 28 June 2016 the plaintiff, by way of notice of motion, filed an application to have the late filing and prosecution of his appeal condoned.

[16] On 13 February 2017 we were seized with the appeal. The appellant's condonation application had also been enrolled. We considered it first. It was unopposed We were of the opinion that the appellant had given a satisfactory explanation for the delay in the noting and prosecution of the appeal. The confusion about the correct identity of the actual transcribers appeared to have been the primary cause of the delay. That being the case, the appellant was not to blame. Accordingly the condonation application was granted.

[17] On the one hand, Mr Rontgen submitted on behalf of the appellant that the court a *quo* materially erred in upholding the respondent's special plea. The thrust of counsel's contention was that the court a *quo* placed *undue emphasis* on the conduct of the plaintiff but disregarded the defendant's acts of neglect and applied the prescription statute in a skewed manner to the plaintiff's detriment and thereby gave the defendant an unfair advantage.

[18] On the other hand, Mr Grabler, counsel for the defendant differed. Counsel submitted that the court a *quo* committed no material misdirection; that the court a *quo* correctly took into account all the facts and circumstances which indicated that relevant documents or records were no longer available seeing that the defendant's file had since been destroyed; that the defendant's recollection had since faded as a result of the long passage of time and that the object of the prescription statute was to ensure that a defendant is not prejudiced by his inability to produce documents long destroyed or to recall what happened long time ago.

[19] The version of the defendant was narrated by Mr Johannes Petrus Louis Grimbeck, the defendant himself. He called no witness to testify for him. He testified that he did not have independent recollection of the plaintiff's claim; that the plaintiff made enquiries about his third party claim during 2012; that he then conducted a careful search for possible documents or records relating to the file; that he subsequently discovered that indeed such a file was opened; that he discovered some documents

which he immediately forwarded to the plaintiff's current attorney; that he ascertained that the file was closed on 1 June 2005; that he would not have closed the plaintiff's file without a reason; that he could not recall the actual reason why he closed the file; that he could not recall or respond to the plaintiff's allegations concerning the consultations; that he could not recognise the plaintiff or his father anymore and that he did not have any knowledge of the plaintiff other than what was apparent from the documents he found.

[20] That, in brief was the sum total of the defendant's version. The theme of his evidence was that he could no longer recall what actually happened because the plaintiff's file had long been closed and subsequently destroyed.

[21] The defendant's version found favour with the court a *quo.* The trial judge expressed his views as follows about the file destruction and the adverse impact of the long passage of time on the defendant's recollective faculties:

"[22] Dit word die verweerder verwyt dat hy nie die saak met die eiser opgevolg het nie, **maar die punt is dat die leer vernietig is, en die verweerder het nie** 'n **manier waarop hy kan vasstel wat hy of die eiser in daardie tydperk gedoen het nie.** Dis waarom verjaringswetgewing bestaan, want geheues vervaag en dokumente word vernietig. Dis presies wat hier gebeur het. Die verweerder onthou nie wat gebeur het nie. En die dokumente is vernietig. Dis onbillik om in die omstandighede meer van die verweerder te verwag as wat hy voor die hof geplaas het."

(my emphasis)

[22] The crucial question on this appeal, and indeed any other case where the special defence of prescription is under consideration, is whether the defendant as the respondent, has discharged the onus. This material consideration must be in the forefront of our minds.

[23] In order to succeed, it was incumbent upon the respondent to establish that, by the exercise of reasonable diligence, the appellant could have ascertained, before 17 December 2010, that the respondent had negligently failed to lodge his third party claim against the Road Accident Fund and the peculiar acts of neglect or circumstances which underlined the breach of mandate. It was common cause that the appellant attained the age of majority on 17 December 2004; that he turned 21 years of age on that day; that the defendant never lodged his third party claim; that such claim was extinguished by extinctive prescription on 17 December 2007; that the plaintiff's right of recourse, in other words cause of action, against the respondent arose on 18 December 2007; and that such right was also destroyed by prescription before or on 17 December 2010.

[24] The correct approach in a case like this, where prescription is relied upon as a special defence, is to consider, first and foremost, the conduct of the, defendant, the party that invokes such special defence. After all the onus rests on him and not on the plaintiff. In the instant case, right from the outset, the focus was shifted from the defendant's conduct to the plaintiffs conduct. In my respectful view, that approach was incorrect.

[25] The court a *quo* reviewed a number of decided cases and immediately turned to the conduct of the plaintiff as the respondent in the prescription proceedings. At par 19 of the judgment the court a *quo* was very critical of the plaintiffs conduct.

"[19] In die geval het die respondent vanaf 2002 tot 2012, nadat hy in 2004 meerderjarig geword het, **niks gedoen het nie.** In hierdie geval, ander as in die **Gunase-saak,** was die verweerder se kantoor heeltyd oop, en is dit steeds oop, 200 meter van eiser se vader se werksplek. Bowendien is die verweerder eiser se vader se werkgewer se prokureur. **Tog het eiser, of sy vader of sy swaer, geen navrae daar gedoen nie, vir nagenoeg tien jaar."** (my emphasis)

I shall revert to the plaintiffs conduct.

[26] Let us consider the defendant's conduct first in order to determine whether he acquitted himself in a manner which justified the verdict he sought and obtained. Before I precede to analize his conduct, I deem it necessary to tabulate some randomly selected snippets by the court a *quo* that persuaded it to find in favour of the defendant:

- "Die eiser se probleem is dat die feite random wat die prokureur gedoen het, as gevolg van tydsverloop nie meer vasgestel kan word nie."
- "As die tydsverloop nie so lank was nie, en die verweerder se leer nie vernietig was nie, sou mens moontlik die redes vir daardie uitjaag {as dit gebeur het) kon vind, en sou mens moontlik kon bepaal wat toe gebeur het."
- "Daardie rekords bestaan nie meer, deur geen skuld van die verweerder nie."
- "Die verweerder onthou nie wat gebeur het nie, en die dokumente is

vernietig."

- "Weens die lang tydsverloop, en omdat die rekords nie meer bestaan nie, weet mens nie wat daardie rede was of watter stappe die verweerder geneem het nie."

[27] Those then were the material considerations that informed the ultimate verdict of the court *a quo.* In exonerating the defendant the court a *quo* found:

> "Die verweerder kan nie ender daardie omstandighede aanspreeklik gehou word nie."

That finding is one which I, on appeal, cannot support. It is my respectful and considered view that what the defendant, as an attorney, did and failed to do can be readily ascertained from the evidence adduced through intense and penetrating cross examination by Mr Rontgen.

[28] As regards the defendant's conduct prior to 17 December 2007, it is important to bear certain crucial facts in mind. It is of utmost importance to appreciate that, although the defendant might have destroyed the file, some relevant accounting records were not destroyed. What the defendant did is apparent from those available accounting records. However, that is not all. From the same remaining paper trail, what the defendant did not do - which he ought to have done - can also be readily ascertained. The finding that what the defendant, as an attorney, did can no longer be ascertained cannot be sustained by the silent story of the accounting records. To his acts of commission and omission I turn now. The accident took place on 25 January 2001. The plaintiff was hospitalised for about 10 days. He **was,** therefore,

released on or before 4 February 2001.

[29] The defendant was appointed before 13 February 2001 to institute a third party claim on behalf of the plaintiff against the Road Accident Fund. The first consultation was, therefore, between 4 February 2001 and 13 February 2001. The defendant saw the plaintiff, then a minor child on a wheelchair, with his father. All that we know about that initial consultation is that the defendant demanded a consultation fee. Other than that, it does not seem he did anything of significance.

[30] The second consultation followed on 13 February 2001. The required R250.00 deposit was paid. The plaintiffs father was issued with a trust receipt number 3711. That trust receipt was the first important accounting record still available.

[31] The defendant drew up the required special power of attorney on 13 February 2001 but failed to have it signed by the plaintiffs father. The terms of the mandate were spelt out. That was the second important document still available.

[32] An extract from the trust ledger showed that on 6 April 2001, the plaintiff's trust account was debited with an amount of R200 and that such a trust cheque was paid to Boitumelo Hospital. The defendant's evidence was that such payment was for the supply of a copy of the plaintiff's hospital records. One wonders as to how the defendant, an attorney,

expected the hospital to furnish him with the patient's hospital records when he did not have a proper mandate signed by the patient. The trust ledger was also an important accounting record still available. What the defendant did could, therefore, be determined with relative ease from those available documentary sources of important information. Now I turn to what the defendant failed to do according to the same available documentary sources.

[33] There was no debit entry on the plaintiff's trust ledger account for any payment made by the defendant in favour of the South African Police Service. In those days the cost of a police accident report was R16.50. The glaring absence of such a significant entry suggests that no trust cheque was ever drawn in favour of the South African Police Service because no letter was ever written by the defendant to request a copy of the essential police accident report let alone police accident plan. To that extent, the trust ledger extract was a reflection of serious professional neglect by the defendant. From the police accident report the offending motor vehicle and its driver are often identified which is why it is such an important document.

[34] Similarly, there was no debit entry shown on the plaintiff's trust ledger account for any payment made by the defendant in favour of Parys Hospital. Because the plaintiff was first taken there and probably seen by a

doctor there before he was transferred, he was obliged to have the prescribed statutory medical report completed there by the first treating doctor. In those days the cost relative to the completion of a statutory medical report was R202.00. The glaring absence of such a significant debit entry tends to indicate that no such trust cheque was ever drawn in favour of Parys Hospital because no prescribed mva claim form was ever completed and sent to Parys Hospital for the completion of the compulsory statutory medical report. To that extent the trust ledger extract was a reflection of yet another serious professional neglect. The date of the victim's first medical treatment generally has to tally or correspond with the date of the accident. The victim's injuries as described by the first treating doctor, are very important which is why the statutory medical report by the first treating doctor is an essential document.

[35] I can, therefore, be readily appreciated that although the file might have been destroyed, all was not lost. The available documentary records give us a pretty fair idea that there was very little lost through the alleged destruction of the file. Where an attorney knows that (s)he had done nothing significant in order to execute a client's mandate, (s)he would naturally be tempted to cover up his or her trail of neglect. The easiest way of doing so is to claim that the file has been destroyed. Behind that seemingly innocent excuse may be a sinister motive to suppress the truth.

[36] Now I turn to the defendant's conduct in relation to the consultations. The first two consultations took place within 19 days after the accident. In his evidence the defendant hardly said a word about important matters such as taking injury photographs of his client, drawing his sworn statement, visiting the scene of the accident at Tumahole on the outskirts of town, advising him about the danger of prescription and warning him about the consequences of failing to honour scheduled appointments.

[37] His evidence was that he routinely consulted according to appointment and that he and his secretary kept diaries for the purpose of regulating consultations with his clients. Such diaries would have been very helpful to show precisely when after 13 February 2001 the plaintiff was supposed to attend his third consultation with him. The diaries would also have helped us to ascertain the date of the last consultation he had with the plaintiff as well as the first appointment the plaintiff had missed. He or his secretary might even have made some useful notes in their diaries as to what the defendant's next line of action was in an attempt to reschedule another appointment in order to make up for the one the plaintiff had missed.

[38] An attorney who knew that his client was a child; that he was on a wheelchair when he first met him; that his injury was *prima facie* serious and that his father was employed a mere 200m away - would not have easily forgotten his client. He would have remembered the day the child took him to the scene of the accident, the scenery photographs he took and the rough

sketch of the scene he drew up. Not so the defendant. He hardly knew that the scene of the accident was at Tumahole. It makes one wonder whether he ever took and drafted the plaintiff's affidavit concerning the accident. If he had diligently carried out his mandate by doing all or some of the things such as those previously mentioned in the preceding paragraph, his memory would not have being as vague as he claimed it to be. He would broadly still recall what actually or probably happened.

[39] The defendant admitted that he did not lodge the plaintiff's third party claim. However, he could not recall the reason why. He merely said he would not have closed the file for no good reason. But we know that the plaintiff's mva claim prescribed on 17 December 2007 and that he closed the file probably on or about 01 June 2005. About three months or so earlier, on 22 March 2005 to be precise, he took a fee of R50,00. He certainly prematurely closed the file 31 months before the date on which the claim was due to prescribe.

[40] He gave no good and understandable reason for doing so.

However he speculated about three or so possible reasons. I hasten to point out that those speculative reasons had no merits. The crucial question was why he did not lodge the plaintiff's claim in good time before 17 December 2007 at the very latest. To that question he gave no answer other than the speculative answers.

[41] One of the speculative answers was that it might well have been that

the plaintiff did not have a *bona fide* mva claim. If he did not have the police accident plan, the offending driver's statement, the victim's statement, or a witness' statement how on earth could he even have come to the conclusion that the plaintiff did not have a valid claim. The likelihood was very high that he did not have any of those helpful documents relative to the substantive merits of the plaintiff's claim. We have to accept that as a fact. He cannot be let off the hook through the easy excuse:

> "I cannot recall anything."

[42] The undisputed version of the plaintiff was that he was riding a bicycle in Brown Street at Tumahole Parys on 25 January 2001; that the insured motor vehicle "x", an ambulance, was approaching him from the front; that the ambulance driver tried to overtake another motor vehicle "y"; that the oncoming motor vehicle "z" hindered "x" from completing the overtaking manuevre; that in a desperate attempt to avoid head-on collusion with "z", "x" moved too far to its right on the wrong side of the road and eventually collided with him on his bicycle.

[43] If those factual allegations were proven to be correct, then the plaintiff had a valid claim against the Road Accident Fund. The substantive merits would have been 100% in his favour. Given those circumstances, no lawyer who considers himself an expert in the field would, for one moment, have thought that possibly the plaintiff had no valid claim.

[44] The other speculative answer given by the defendant was that the

plaintiff might have failed to give him further instructions. Could lack of proper instructions have prevented the defendant from lodging the plaintiff claim before 17 December 2004? The plaintiff did not expressly say so in so many clear words. However, he implicitly wanted the court a *quo* to believe that it might well be that the plaintiff did not make regular enquiries concerning the progress which he, an attorney, was making.

[45] Let us assume, without deciding the point, in favour of the defendant, that the plaintiff was an unco-operative client who did not keep appointments for consultation. Even in those circumstances, the onus still rested squarely on the defendant to prove what constructive steps he practically took to overcome such a problem. He would have easily contacted the plaintiff's father whose workplace was only 200m away from his office. We knew he never made such an effort. In my view, he hopelessly failed to discharge the onus. As earlier demonstrated he failed to do any investigation of the circumstances of the accident. We are still in the dark as to precisely what lack of further instructions could possibly have prevented him from lodging the claim.

[46] What we know is that soon after his discharge from the hospital, the plaintiff wasted no time. First he went to Tumahole Police Station where he obtained a police note on which either the accident report number or the crime administration system number was reflected. During the further consultation after that of 13 February 2001, the plaintiff handed such note to

the defendant. Instead of addressing a letter to the Station Commissioner, Tumahole Police Station for copies of the police accident report and police accident plan, the defendant sent his injured client, who was on a wheelchair at the time, to the police station. It has to borne in mind that the defendant had accepted the mandate to do whatever was necessary to finalize the plaintiffs claim for compensation. Mr Rontgen's cross examination demonstrated beyond any shadow of doubt that the defendant did nothing towards the attainment of that objective.

[47] It was the defendant's evidence that he closed the file on 1 June 2005. He testified that he ascertained the date from the office register of closed files. However, he did not discover the alleged register or at least the relevant page on which the alleged entry appeared. The premature closing of a client's mva file by an attorney, for whatever reason, without the knowledge of a client is a very serious matter. Such an important decision has to be made after a thorough consideration of its possible future repercussion on the client as well as the attorney concerned. Whether the closing is prompted by the perceived lack of instructions or cooperation on the part of a client or an attorney's subjective opinion that a client has no valid mva claim - an attorney's decision to close a client's file as well as the actual reason underlying such a decision - must be taken as quickly as practically possible and conveyed to a client without any undue delay.

[48] No stone must be left unturned to ensure that such a unilateral decision

to terminate a mandate is brought to a client's actual attention. Ideally an attorney must write a detailed letter to a client, attach a copy of the file contents and have it delivered to a client by a sheriff or a courier. Where a reliable postal service system exists, such a letter and attachment may be delivered by registered mail. However, *traditio brevi manu* by a sheriff or a courier is the ideal method.

[49] When a file is closed in those circumstances, a serious third party lawyer appreciates that another lawyer may emerge on the scene sooner or later. For that reason, he preserves a copy of that last letter to client in special risk lever file. This is done in order to ensure that the important history of the unaccomplished mission is not lost but permanently stored beyond the date of the file destruction. Where the mandate has been successfully accomplished it is permissible to destroy a file five years after the date of its closure. But where there was no happy ending to the mandate, as in this case, it is unwise to do. In such a scenario the preservation or storage of the last letter to back up and to refresh the memory of an attorney is of vital importance. The underlying idea behind all these cautionary steps is to give a discarded client a reasonably adequate opportunity of appointing another attorney in order to salvage his claim from the destructive tenticles of the monster called prescription.

[50] It is obvious that an attorney can only take such protective measures to safeguard, not only the interest of the victim but his or her own interests

as well, provided he had immediately investigated the accident. In this instant matter, the indications are that the defendant failed to do so. He failed to do so in almost seven years. The accident occurred on 25 January 2001. He was appointed as early as 13 February 2001. The plaintiff turned 21 years of age on 17 December 2004. The period of prescription commenced running against him as from 18 December 2004. His claimed prescribed on 17 December 2007.

[51] Let me hasten to clarify one uncertainty. The offending motor vehicle was an ambulance. In a small town such as Parys there were certainly not many of those. By the exercise of reasonable diligence the defendant would have easily identified such an ambulance, its owner and its driver at the time of the accident even if such driver did not report the accident. In my view it was unlikely that the driver did not. I say so because the plaintiff went to the police station before 13 February 2001 to get the police reference of the accident. There he discovered that the police already knew about the accident in which an ambulance was involved.

[52] For these reasons it can be accepted, as a fact, that the plaintiff's claim did not arise out of a road accident where neither the identity of the offending driver nor the description of the offending motor vehicle was unknown. Had the accident been the so-called hit-and-run, it would have prescribed on 24 January 2003. However, it did not because **it was** not.

[53] In the light of all these peculiar circumstances relative to the defendant's

conduct, I have come to the conclusion that the evidence showed that the defendant committed several acts of neglect; that the plaintiff was in no way to blame for such negligence and that the defendant's exclusive negligence was the sole cause of the prescription of the plaintiff's claim against the Road Accident Fund on 17 December 2007. I would, therefore, determine the first leg of the enquiry in favour of the plaintiff.

[54] As regards the second leg of the enquiry the focus shifts to the plaintiff's conduct, before and after the prescription of his claim on 17 December 2007.

[55] In considering his prior conduct we have to determine whether the finding of the court a *quo* was correct. The court a *quo* rejected, as recent fabrication, the explanation of the plaintiff as to why he did not make frequent enquiries concerning progress. It must be remembered that it was, first and foremost, the defendant's basic responsibility to give regular written progress reports to the plaintiff. He conceded during cross examination that no correspondence existed to show that he complied with such basic mandatory obligation. The obligation of the plaintiff to make enquiries concerning progress was a matter of secondary importance.

[56] The plaintiff evidence was that he was injured in a road accident on 25 January 2001; that the first consultation was before his father paid the deposit of R250,00; that the second consultation entailed his delivery of

the police and hospital references as the defendant had requested and that the third and last consultation with the defendant took place during the year 2002. He was accompanied by his father, Mr Vali Friedman Jakobo and his brother-in-law, Mr Tshediso Michael Thabatha, who acted as the spokesperson. **Until then he had never received any letter from the defendant.** His brother-in-law enquired about progress. The defendant became agitated and angrily answered that such cases take time to finalise.

The following exchange between Mr Rontgen and the plaintiff is important.

"Nau het een van die twee gevra van die vordering van die saak?

My pa het oak gevra.

Nau jou swaer het gese dat mnr Grimbeek gevra het wie is jy?

Dit is nou wie is jy, hy verwys na die swaer? - My swaer het gevra, en dit is toe mnr Grimbeek horn meegedeel het **kyk hierdie tipe sake neem lank, en ek sal julle bel en julle in kennis stel in verband met die vordering van hierdie saak."**

[57] The plaintiffs legal representative wanted to know what then happened after the angry reaction:

"Nau wat het daarna gebeur, het jy op 'n stadium bekommerd geraak? - Mnr Grimbeek, u Edele, toe hy daar met ans gepraat het was **hy baie kwaad gewees** en op daardie stadium het **my pa ons gese nee ons moet loop, ons moet die verweerder daar laat en kans gee, hy sal hierdie eis hanteer."**

[58] Now two things emerge from this. The plaintiff patiently waited for about 2.5 years before the last consultation to hear from the defendant. He waited in vain. He received no letter or a call from the defendant. He became

anxious. Because he and his father could not speak Afrikaans or English well, he asked his brother in-law to accompany them. That then was the prelude to the last consultation. To the defendant the three men, concerned about lack of communication and progress, went. They met the defendant. Seemingly the brother-in-law was very vocal and critical. The defendant did not like his attitude. Tempers flared between the two.

The defendant became so upset by Mr Thabatha he showed the plaintiff and his relatives the door. To put an end to the acrimonious discussion, the father intervened like a peacemaker. He appealed to the two young men that they should leave in order to give the defendant a chance to deal with the plaintiff's mva claim.

Mr Thabatha substantially corroborated the plaintiff's version.

[59] The court a *quo* disbelieved the plaintiff's version on the ground that it was inconsistent with that of his father. The difference between their accounts as far as the last consultation was concerned, had to do with the attitude of the defendant. According to the plaintiff the defendant was so impolite and annoyed that he chased them away. But according to his father the defendant was polite towards them. He was not angry with them.

[60] Two points must be borne in mind here. The first is that the plaintiff's account derived substantial support from that of his brother-in-law. The second is that the plaintiff's father was in the employ of the man regarded as the defendant's friend. The evidence of the brother-in-law was that the father

was afraid to upset the defendant, who was a friend to his employer, by telling the court that the defendant was so annoyed and discourteous to them that he chased them out of his office. I am persuaded by Mr Rontgen's submission that such explanation was the most logical and probable explanation of the variance between the evidence given by the plaintiff as supported by the brother-in-law and that given by his father but unsupported by anyone.

[61] In my view too much was made of the aforesaid variance. We should, on appeal, resist the temptation of building a mountain out of a molehill. The court *a quo* rejected the plaintiff's version as corroborated by the brother-in-law on the further ground that it was never put to the defendant during cross examination by Mr Rontgen that he was so annoyed that he chased the plaintiff and his relatives out of his office.

[62] It was indeed so. In my view, however, such omission by itself did not justify the rejection of the two young witnesses. Even if that aspect of their version was put to the defendant, we know what his answer would probably have been:

> "I can't recall it. Therefore, I deny it"

Such was his master answer throughout the duration of his stay in the witness box. The record is replete with numerous variations of such reply.

[63] Whether the defendant was courteous or discourteous - friendly or unfriendly - polite of impolite - happy or angry - is neither here nor there. The singular variance was not a point of such decisive importance as to warrant

the rejection of the defendant's version as supported by his brother-in-law to the effect that the defendant persuaded them to leave the matter in his capable hands; that he knew what he was doing; that such claims take a long time to finalize and that he would call them. Perhaps that 'angry' tone of his voice, probably coupled with angry facial expression as well as angry gesticulations, the plaintiff perceived as a silent warning:

> "Don't ever bother me again."

The factual distinction between the instant matter and that of **Gunase v Anirudh** 2012 (2) SA 398 (SCA) is great. In this instance, the attorney discouraged the concerned client from making enquiries.

[64] It must be kept in mind that the plaintiff was not well-spoken as far as Afrikaans and English were concerned. During the first consultation he and his father had to talk to the defendant through a certain lady who acted as an interpreter. I take it, therefore, that his father was also not well conversant with those two languages. His brother-in-law sharply crossed swords with the defendant during the last consultation. The acrimonious consultation, quite apart from the defendant's assurance that he knew what he was doing, probably discouraged the plaintiff from visiting the defendant again to enquire about progress. He and his brother in-law, therefore, did not want to bother the defendant again. The father behaved himself in exactly the say manner. His similar corresponding passage of time, then the attorney is precluded from invoking the passage of time as a defence.

[68] It would be fallacious and indeed unjust to let the attorney benefit from such a cynical defence. He created the situation. He cannot simply walk away from it now. He put his trusting client in that invidious situation. There is a price he has to pay. Such price is the harvest of neglect.

[69] The merits of the claim were extensively canvassed during the trial. The court a *quo* even gave judgment on the merits. In their respective written heads of argument, the parties again extensively addressed the merits. During the course of oral submissions on appeal before us, both counsels again fully dealt with the merits. In our judgment on appeal, the merits were again extensively considered and reasoned. In all probabilities, virtually nothing more can still be said by the parties. It would, therefore, appear that practical exigencies dictate that we give judgment on the merits in order to put the matter to final rest. For the reasons mentioned elsewhere in this judgment, we are of the view that the trial court ought to have given judgment in favour of the plaintiff.

[70] The plaintiff has been successful. He is entitled to the fruit of his success. The cost of the appeal must follow success. Moreover, he ought to have succeeded in the court a *quo.* There is no reason why the cost in the court a *quo* should not be awarded in favour of the plaintiff.

[71] Accordingly I make the following order:

71.1 The appeal succeeds with costs.

71.2 The order granted on 7 August 2014 is set aside and it is substituted

with the one below:

7.12.1 The special plea of the respondent is dismissed with costs.

7.12.2 The merits are determined in favour of the plaintiff, with costs.

7.12.3 The defendant is 100% liable to the plaintiff in such an amount of damages as the plaintiff may prove or as may be agreed upon between the parties.

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M.H RAMPAI, J

I concur

_____

C. VAN ZYL, J

I also concur

_____

J.J MHLAMBI, J

On behalf of the appellant: Attorney KM Rontgen Sr

Instructed by: Rontgen & Rontgen Incorporated

Pretoria

and

McIntyre & Van der Post

Bloemfontein

On behalf of the respondent: Adv. JE Grobler

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