**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, DURBAN**

NOT REPORTABLE

Case No: 17025/2009

In the matter between:

**GENESIS MEDICAL SCHEME** **PLAINTIFF**

**and**

**MCCARTHY LIMITED** **DEFENDANT**

**Coram:** Kruger J

**Heard**: 6 February 2017

**Delivered:** 15 February 2017

---

**ORDER**

---

1. The Defendant's special plea is dismissed with costs.

---

**JUDGMENT**

---

**KRUGER J:**

[1] This matter serves before me as a stated case in terms of the provisions of Rule 33, relating to a special plea raised by the Defendant. The history of the matter has been abbreviated in the agreed statement of facts. In order to fully comprehend the dispute, I will reiterate the background facts.

[2] On the 13th January 2008 Ms Roxanne Joubert ("Joubert") was injured when a Yamaha Rhino 660 all-terrain utility motor vehicle ("Rhino vehicle") tipped and rolled over. At the time the Rhino vehicle was driven by a Mr Lloyd Vercuil at the Springfield racetrack.

[3] Joubert sustained serious injuries and underwent numerous operations in Durban and Cape Town. Joubert was a member of the Plaintiff and in terms of her membership of the Plaintiff, the Plaintiff became liable to pay and did pay medical expenses in the sum of R435 802,93.

[4] By letter dated 27th February 2008, Joubert consented and recorded that she would have no objection to the Plaintiff instituting a third party claim with the purpose of recovering its medical expenses.

[5] On or about 31st January 2009, Joubert instituted an action against the Defendant under Case No. 11067/2009 for the recovery of damages arising from the injuries she suffered as a result of the incident hereinbefore described. Of importance is paragraph 14.1.3 of her amended particulars of claim which reads as follows:

> "14.1.3 The Plaintiff abandons her claim in respect of past medical expenses in the amount of R313 707,89 as reflected in "PC2" attached

hereto, as Genesis Medical Scheme is claiming these amounts from the Defendant."

[6] Of importance too is the fact that the Defendant did not plead to the aforesaid paragraph 14.1.3.

[7] On or about 11th December 2009 the Plaintiff, under Case No. 17025/2009 instituted the present action in respect of the medical expenses hereinbefore mentioned.

[8] It appears from the documents and affidavits in the court file that attempts were made to consolidate the two actions (Cases 11067/2009 and 17025/2009). This consolidation was not achieved for various reasons, *inter alia*, that there were numerous delays in respect of expert testimony and ultimately settlement negotiations.

[9] On or about 20th January 2015 Joubert and the Defendant entered into a settlement agreement in terms of which the Defendant agreed to pay Joubert the sum of R727 967,16 "in full and final settlement of the Plaintiff's claim, interest and costs". (my emphasis). Thereafter Joubert, by notice dated 18th February 2015 withdrew her action against the Defendant.

[10] In the present action the Plaintiff contends that arising from Joubert's express consent (Letter of the 27th February 2008) read with paragraph 14.1.3 of her amended particulars of claim, her claim against the Defendant for the recovery of the said medical expenses has been subrogated and transferred to the Plaintiff.

[11] The Defendant, in a special plea, contends that by virtue of the settlement agreement entered into between Joubert and the Defendant, the Plaintiff's claim for past medical expenses has been compromised, "thereby terminating any rights the Plaintiff might have had in respect of any future claim that arose from the incident".

[12] The Defendant has further pleaded that the Plaintiff's claim and Joubert's claim arose from a single cause of action. A single cause of action remains incapable of sustaining a plurality of claims. This is referred to as the 'once and for all" rule.

[13] Corbett JA, described the once and for all rule as:

> "The "once and for all" rule applies especially to common law actions for damages in delict, though it has also been applied to claims for damages for breach of contract. …… Expressed in relation to delictual claims, the rule is to the effect that in general a Plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action."

**Evins v Shield Insurance Company Ltd 1980(2) SA814(AD) at 835 B-D**

He further held that the purpose of the once and for all rule is to "prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation" (**Evins v Shield Insurance Company Ltd – supra at 835 E**)

[14] Mr Eia, on behalf of the Plaintiff, has submitted that the once and for all concept is based on the doctrine of *res judicata*. As there was no judgment granted against Joubert, he has submitted that *res judicata* does not apply and the Plaintiff is accordingly not precluded from proceeding with the current action. Mr Eia's submission is, with respect, based upon an incorrect reading and

interpretation of Corbet JA's judgment in **Evins v Shield Insurance Company Ltd** (supra). In the judgment, particularly at page 835 – F, the learned Judge commented that the once and for all rule is similar and "closely allied" to the principle of *res judicata*. He did not find that *res judicata* was an element of the once and for all rule as I understood Mr Eia's submission to be.

[15] In the agreed statement of facts in terms of Rule 33, the parties are *ad idem* that both the Joubert action and the present claim arise from a single cause of action.

[16] Given this concession by the Plaintiff, coupled with the authorities referred to earlier in this judgment, it appears that the Defendant's special plea is a sound one. However, there is another aspect that warrants further consideration.

[17] As stated earlier in this judgment, the Defendant was at all times aware that the claim for past medical expenses had been transferred to the Plaintiff. Paragraph 14.1.3 of Joubert's particulars of claim is proof of this. By failing to plead to the said paragraph 14.1.3 of Joubert's particulars of claim, the Defendant agreed to what was pleaded. The Defendant agreed or admitted this fact. (See Rule 22(3)). Absent the consent of the Defendant, Joubert was not entitled to divide or separate or split her right of action against the Defendant. **Spies v Hansford and Hansford Ltd 1940 TPD 1**; **Lief, NO v Dettmann 1964(2) SA252(AD) at 275 F**; **Evins v Shield Insurance Company Ltd (supra) at 827B**.

[18] There is no indication on the papers before me (prior to the filing of the amended plea which contained the said special plea) that the Defendant, when notified of Joubert's transfer of the right to claim past medical expenses to the Plaintiff, objected to or opposed such transfer. The Defendant accepted that

another action would be instituted for the recovery of past medical expenses and proceeded with the litigation/action instituted by Joubert on this basis. When the Defendant entered into the settlement agreement with Joubert, it did so on two bases – viz (a) that there was another action pending against it for past medical expenses (indeed it had already received the summons and had defended the action) and (b) it settled the action with Joubert based on her claim as is set out in the Particulars of Claim. As stated earlier, this claim excluded past medical expenses.

[19] I am accordingly satisfied that the Defendant consented either expressly or tacitly, or both, to the separation or splitting of the right of action. As such the Defendant cannot now object to the Plaintiff's action which has been instituted against it.

[20] I accordingly make the following order:

1. The Defendant's special plea is dismissed with costs.

_____

KRUGER J

| | |
|---|---|
| DATE OF HEARING: | 6 February 2017 |
| DATE OF JUDGMENT: | 15 February 2017 |
| FOR THE PLAINTIFF: | P Eia instructed by KSS Keller Snyman Schelhase |
| FOR THE DEFENDANT: | Callum SC instructed by Woodhead Bigby Inc. |