44/96

Case No 535/94
I H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

MUTUAL & FEDERAL INSURANCE COMPANY LIMITED Appellant

v

JULIA NDEBELE Respondent

CORAM : HEFER, VIVIER, HOWIE, SCHUTZ JJA and PLEWMAN AJA

HEARD : 11 MARCH 1996

DELIVERED : 29 MARCH 1996

J U D G M E N T

HEFER JA :

The sole issue in this appeal is the effect of s 1 of the Apportionment of Damages Act 34 of 1956 ("the Apportionment Act") on art 43(a) of the agreement which s 2 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 incorporated in the law of South Africa. Art 43(a) applies in cases where a claim for compensation under art 40 of the agreement includes a claim for the claimant's loss in respect of future medical and related costs. It entitles the Multilateral Motor Vehicle Accidents Fund ("the MMF") and its appointed agents, instead of paying the costs in question, to furnish the claimant with an undertaking to compensate him in respect thereof upon proof that they have been incurred. What has to be decided is whether art 43(a) permits an undertaking to compensate the claimant for only a portion of his future medical costs where the parties are agreed, or the court finds, that the claim falls to be reduced in terms of s 1 of the Apportionment Act on account of the claimant's contributory fault

in the causation of his damages.

The appellant is an appointed agent of the MMF and the respondent the mother and natural guardian of a child who was injured in a motor collision during March 1990. The respondent sued the appellant in her personal and representative capacity in the Witwatersrand Local Division for compensation under art 40. Having alleged in her particulars of claim that the child would require life-long medical and attendant care and periodic institutionalisation as a result of his injuries, she included in the claim a large amount in respect of future medical and related expenses. These and other material allegations were denied in the plea but when the matter eventually went to trial the parties informed the court by way of the minutes of a pre-trial conference that

> "2. [the] parties have reached agreement in regard to the issue of liability for damages, which agreement is to the effect that fault is to be apportioned 80:20 in Plaintiff's favour...
> 4. The only remaining issue in dispute regards future

medical and related expenses.

5. In regard to such expenses, the Defendant has offered to furnish an undertaking purportedly in terms of Article 43 of the Act, to pay 80% of such costs.

6. The plaintiff rejects this offer and maintains that the Defendant is not permitted in law to apportion an undertaking under Article 43."

Blieden J who presided, upheld the contention in par 6 of the minutes in a judgment reported *sub nom Ndebele v Mutual & Federal Insurance Co Ltd* in 1995 (2) SA 699 (W). The appeal has been brought, with the leave of the trial Judge, against his finding that "the certificate tendered by the defendant in terms of article 43(a) of the Act is not in compliance with such article" and the attendant order of costs against the appellant.

As appears from 704A-B of the report the *ratio* for the conclusion that the "certificate" (it actually was an undertaking purportedly furnished in terms of art 43(a)) did not comply with art 43(a) was that a construction favouring the validity of an undertaking to pay only a portion of the

relevant costs, would (1) be contrary to the actual wording of art 43(a) and would (2) lead to harsh and unreasonable results which the legislature could not have intended. In this court the argument for the respondent followed the same lines. I will deal *seriatim* with the two legs of the argument.

Art 43(a) of the agreement reads as follows :

"Where a claim for compensation under article 40 -

> (a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, the MMF or its appointed agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the MMF or its appointed agent to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof."

Before the wording of the provision is examined it will be useful to

deal briefly with its purpose and scope. Although it applies to all claims which include a claim for the costs of the specified kind (for convenience I will refer to these costs as "future medical costs") it really falls within a very narrow compass. Viewed as a matter of substantive law it merely entitles the MMF and its appointed agents (henceforth I will avoid the tedium of repeatedly adding the reference to appointed agents) to compensate a claimant in respect of his future medical costs upon proof that they have been incurred. The purpose of the provision is clear. Under the common law

> "a person or his dependant is only accorded a single, indivisible cause of action for recovering damages for all his loss or damage for the wrongful act causing his disablement or death"

(per Trollip JA in *Casely NO v Minister of Defence* 1973 (1) SA 630 (A) at 642C-D). A claimant under art 40 is accordingly precluded from recovering an alleged prospective loss in a separate action. Since such a

loss is not always capable of ready proof and precise quantification the courts are often required to adjudicate on claims for an alleged future loss of income or for future medical costs by making little more than an informed guess. Viewing the matter either from the claimant's or the defendant's side, this can hardly be said to be satisfactory. Basically for these reasons Trollip JA who delivered the judgment of this court in *Marine & Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A) while dealing with the predecessor of art 43(a) (s 21 (1C) of Act 56 of 1972, as amended), said at 970G-H :

> "Now para (a) of the amendment is designed for the benefit of authorised insurers and has the effect, if invoked, of eliminating the uncertainties and imponderables inherent in having to adjudicate once and for all the *quantum* for the future loss or damage mentioned therein."

Bearing this in mind and further that we are concerned with the validity of an undertaking purportedly furnished in terms art 43(a) I turn to

the wording of the provision.

Read in context the reference therein to "an undertaking to that effect" must be construed as an undertaking by the MMF "*to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof.* "Dealing with the reference to "the said costs" Blieden J (at 701J-702B) adopted - out of context, it would appear - a passage from the judgment in *Maja v South African Eagle Insurance Co Ltd* 1990 (2) SA 701 (W) at 709C-D to the effect that the words "must refer to the costs which are claimed by the plaintiff and not some other costs which the defendant thinks are those with which the plaintiff ought to be satisfied." With respect, this is precisely what art 43(a) does not say. The benefit to the MMF lies in the very fact that it need only undertake to compensate the claimant in respect of costs *proved to have been actually incurred* - not the costs claimed by the plaintiff.

Dealing at 703F-G specifically with the question at issue, Blieden J reasoned as follows :

> "But there is nothing in art 43 that in any way deals with anything but 'the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying goods to him.' There is no reference whatsoever to any portion or part of such costs, only to 'the costs'."

At 703I-J the learned judge added :

> "Applying the general rules which are applicable to the interpretation of statutes, it is my view that a proper reading of art 43(a) of the Act makes it plain that it only makes provision for the payment of costs, not portion or part of any costs incurred."

In my view, however, no particular significance can be attached to the fact that future medical costs are specifically mentioned whereas a part or portion thereof is not. Of greater significance is the description of what precisely the MMF must undertake. It is not required to undertake to compensate the claimant *for* the medical costs, but to compensate him *in*

respect of such costs. The expression "in respect of" has, of course, an extremely wide and indefinite meaning and, whenever it appears, it is essential to examine the context in order to ascertain the sense in which it is used. (*Commissioner for Inland Revenue v Crown Mines Ltd* 1923 AD 121 at 128; *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another* 1965 (4) SA 373 (A) at 384B-D to mention only two of the many cases in which the expression was considered.) I will examine the context in a moment but before doing so, I may say that I find it difficult to accept that such a wide and indefinite expression would have been used, had the intention merely been to require an undertaking to compensate the claimant for all costs proved to have been incurred, ie simply to pay him the full amount expended.

Any construction of art 43(a) must take account of the fact that, in the event of the reduction of a claim in terms of s 1 of the Apportionment

Act, the liability of the MMF is limited to its allotted share of the proven loss or damage, and that a claimant can recover from the MMF nothing in excess of the reduced amount. This limitation has been recognised, and practically put into effect, in countless cases since the promulgation of the Apportionment Act during 1956. The result is that, whenever a claimant's claim is reduced on account of his own fault in relation to the collision in which he was injured, the reduction affects his entire proven loss including his future medical costs. Even in the present case Blieden J accepted at 702C-D that, had the MMF elected to pay the claim for future medical costs (instead of furnishing an undertaking) the amount would have been "subject to any agreed or awarded apportionment." Respondent's counsel made a concession to the same effect. Had it been the intention to exclude the operation of such a well-known principle in the case of an undertaking in terms of art 43(a) I would have expected the legislature to state its

intention in unequivocal terms. This it did not do and its failure to do so becomes even more significant in the light of the wording of art 43(b) and art 44. Art 43(b) deals with claims for future loss of income or support and entitles the MMF, after furnishing a claimant with an undertaking to that effect, "to pay *the amount payable by it...* in respect of the said loss..." in instalments. Art 44 entitles the persons who supplied the accommodation, treatment or goods or rendered the services referred to in art 43(a) to claim the amount from the MMF, *provided that their claims may not exceed the amount which the third party could have recovered.*

These are weighty considerations. They compel me to the conclusion that the expression "in respect of" was used in art 43(a) in the wide sense as indicative merely of a relationship between the compensation and the medical costs. In that sense the expression includes an undertaking for portion of the amount expended.

The matter may be tested in another way by focusing attention on the court's power to direct the MMF to furnish an undertaking - referred to in art 43(a) as "such undertaking" but which must plainly meet the same requirements attached to an undertaking furnished by the MMF of its own accord. Could it ever have been intended that, where the court orders a reduction in terms of s 1 of the Apportionment Act, it should direct the MMF to furnish an undertaking to compensate the plaintiff in full for his future medical expenses or, conversely, that the court would not be competent to direct an undertaking to be given which takes the reduction into account? The first question was answered in the negative and the second positively in *Majele v Guardian National Insurance Co Ltd* 1986 (4) SA 326 (T) at 327I-328E and I fully agree.

I turn to the second leg of the argument. In order to consider the so-called harsh results which would follow if Blieden J's construction were to

be rejected one has to contrast the position of a claimant armed with a limited undertaking with his position after the receipt of an award in respect of future medical costs which would, on account of apportionment, not be sufficient to ensure full payment of such costs. Common to both situations is his inability to pay such costs in full. It is thus inevitable that both will entail harsh results and, despite the reasoning at 702E-703C of the judgment and the argument for the respondent in this court, I have not been persuaded that the results of the construction rejected by the court *a quo* are demonstrably worse. This is accordingly not a case in which the result of any particular construction can be of assistance in the search for the legislature's intention. In my view the court *a quo* came to the wrong conclusion.

Since the appeal must succeed and the respondent directed to pay the costs of appeal, a final word on counsel's fees is required. Respondent

objected to the fees of both counsel for the appellant being allowed. I think rightly so. The services of two advocates can be justified neither by the amount of work involved in the appeal nor by the complexity of the issue.

The following order is made :

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside. It is replaced by an order

   (a) directing the defendant to furnish to the plaintiff the undertaking offered at the pre-trial conference;

   (b) directing the plaintiff to pay the defendant's costs.

JJF HEFER

CONCURRED : VIVIER JA
HOWIE JA
SCHUTZ JA
PLEWMAN AJA