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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 19574/2017

In the matter between:

S[...] J[...] J[...] W[...]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

REASONS DELIVERED ON 8 FEBRUARY 2023

VAN ZYL AJ:

Introduction

1. On 6 February 2022 I granted an order in the following terms:

“1. The Defendant shall be liable for 100% (One Hundred Percent) of the Plaintiff’s damages set out in paragraphs 2 and 3 below.

*2. The Defendant shall, by agreement, pay to Plaintiff’s attorneys of record by means of an electronic transfer of funds the sum of **R 4 273 170.00** (Four Million Two Hundred and Seventy-Three Thousand One Hundred and Seventy Rand) which amount is in respect of the Plaintiff’s Loss of Income and General Damages.*

3. *The Defendant shall in addition to the amount referred to in paragraph 2 above, pay to Plaintiff's attorneys of record by means of an electronic transfer of funds the further sum of **R 676 973,17** (Six Hundred and Seventy Six Thousand Nine Hundred and Seventy Three Rand and Seventeen Cents) which amount is in respect of the Plaintiff's Past Hospital and Medical Expenses.*

4. *The capital amounts referred to in paragraphs 2 and 3 above shall be paid to Plaintiff's attorneys of record by means of an electronic transfer of funds, within 180 calendar days from the date of this order, however, the Defendant will be liable for interest on the capital amount at the applicable interest rate as from 14 court days from date of this order to the date of final payment. The Plaintiff shall not proceed with a warrant of execution prior to the expiry of the aforesaid 180-day period.*

5. *Defendant shall provide Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to compensate him for the costs for his future accommodation in a hospital or nursing home, the appointment of a case manager or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the accident on 29 July 2016.*

6. *Defendant shall pay Plaintiff's taxed or agreed costs on the High Court Scale to date hereof, as between party and party, inclusive of the cost for trial on 2 February 2023 and 6 February 2023, and including but not limited to, the costs as set out hereunder and which costs are to include:*

6.1 *The costs incurred by Plaintiff's attorneys in instituting and prosecuting this action, as well as all costs attendant upon the obtaining of payment of the capital amounts and obtaining the Undertaking referred to above;*

6.2 *The taxed or agreed fees, expenses and allowances incurred in relation to Plaintiff's experts, which Rule 36(9)(a) & (b) Notices have been filed and all expert reports furnished to the Defendant by discovery or otherwise, including their preparation and qualifying fees and all reasonable and necessary costs attached to the preparation and procurement of their expert reports, as well as other related costs such as X-rays, Form 4 (serious assessment), addendum reports, collateral*

procurement, joint minutes, consultations and travel to consultations and their day fees for the trial set down on 2 February 2023.

6.3 The Plaintiff's experts are:

6.3.1 Dr R Jaffe (Orthopaedic Surgeon);

6.3.2 Dr Z Domingo (Neurosurgeon);

6.3.3 Dr J Faure (Urologist);

6.3.4 Dr K Cronwright (Plastic & Reconstructive Surgeon);

6.3.5 Elspeth Burke (Clinical Psychologist);

6.3.6 Nadia Jacobs (Occupational Therapist);

6.3.7 Karen Kotze (Industrial Psychologist);

6.3.8 Munro Forensic Actuaries (Actuary).

6.4 The taxed or agreed fees of Plaintiff's Counsel, such costs to include consultations with the Plaintiff's Attorney, the Plaintiff and expert witnesses, Counsel's Advice on Quantum, attendance at any pre-trial conferences as well as his trial preparation and day fees for 2 February 2023 and 6 February 2023.

6.5 The taxed or agreed fees of the Plaintiff's attorney for attending pre-trial hearings and attending to amendments of the particulars of claim, subject to the discretion of the taxing master.

6.6 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant.

7. *The payment of the legal costs shall be payable within 180 (one hundred and eighty) calendar days following settlement or the taxing master's allocator, in the event of taxing the bill of costs, whichever is applicable, however, the Defendant will be liable for the interest on the cost amount at the applicable interest rate as from 14 court days of the date of this order to the date of final payment. The Plaintiff shall not proceed with a warrant of execution prior to the expiry of the aforesaid 180-day period.*

8. *Payment of the amounts reflected in paragraphs 2, 3 and 6 above shall be effected directly to Plaintiff's attorneys of record by means of an electronic transfer into the trust account mentioned below.*

9. *It is recorded that there is a valid Contingency Fee Agreement herein between the Plaintiff and DSC Attorneys, and there has been compliance with all relevant provisions of the Contingency Fees Act No. 66 of 1997.*

10. *Plaintiff's attorney's trust banking account details are as follows:- ..."*

2. The reasons for the grant of the order are set out below.

The plaintiff's claim

3. On 29 July 2016, the plaintiff was a passenger in a motor vehicle that collided with an insured driver as contemplated in section 17(1) the Road Accident Fund Act 56 of 1996 ("the Act"). As a result of the collision, the vehicle in which the plaintiff was travelling left the roadway and rolled.

4. The plaintiff sustained serious bodily injuries as a result of the collision. They are set out in the particulars of claim as well as in the expert reports filed of record for the purposes of this action. It is not necessary to detail the injuries as, prior to the hearing of the action, the parties settled the question of liability. It was agreed, first, that the defendant was liable for 100% of the plaintiff's proven damages and, second, that the plaintiff's injuries were serious as contemplated in section 17(1) read with section 17(1A) of the Act in respect of claims for general damages ("non-

pecuniary” damages).

5. What remained was the issue of *quantum*. The plaintiff claims damages in respect of past medical and hospital expenses, future medical and related expenses, estimated past and future loss of earnings, alternatively, past and future loss of earning capacity, and general damages for pain and suffering and loss of the amenities of life.

6. Prior to the hearing of the matter, the parties reached an agreement in relation to all of the damages except for the past medical and hospital expenses. The hearing therefore continued only in respect of those damages.

Events at the hearing

7. The plaintiff’s claim in relation to past hospital and medical expenses comprised expenses that he had himself incurred, as well as expenses incurred by his contracted medical aid scheme, Momentum.

8. At the commencement of the hearing, counsel for the plaintiff indicated that a directive had been issued by the defendant’s chief executive officer in August 2022 to the effect that the defendant would no longer reimburse the expenses paid by a medical aid scheme on a plaintiff’s behalf. That was the basis for the defendant’s refusal to settle those expenses with the plaintiff.

9. Prior to the leading of evidence, the defendant indicated that it had queries in relation to some of the expenses incurred by Momentum. The defendant later informed the Court that those issues had been resolved and that it was no longer necessary to hear evidence relating to those expenses. The total amount of expenses paid by Momentum is about R581 079,00.

10. The plaintiff gave evidence regarding the expenses that he himself had incurred. He confirmed that those expenses were incurred as a result of the injuries sustained in the collision. They related mainly to the payment of one months’ rental for accommodation with a lift as opposed to stairs (the plaintiff had difficulty walking)

and to medication for the relief of pain in his neck and head. The plaintiff used the services of a biokineticist at a Virgin Active gym because the service was less costly than going to a private practice. He received treatment for the nerve damage in his fingers, as well as stretch exercises for his neck and back. He also consulted a specialist in relation to a procedure to be done for the purposes of pain relief.

11. The plaintiff's evidence was not seriously disputed in cross-examination – correctly so. There is no reason to doubt that the costs had been incurred as a result of the collision and its *sequelae*, and that it was necessary to incur them. The plaintiff, moreover, was careful to save costs wherever possible. The defendant did not lead any evidence to the contrary. The defendant in fact subsequently agreed that it would be liable for the costs incurred by the plaintiff in the sum of about R95 893,00.

The payments by Momentum

12. At the close of the evidence, therefore, the only issue that remained was whether the defendant should be ordered to pay the costs incurred on the plaintiff's behalf by Momentum, given the directive of August 2022. The directive reads as follows:

“Dear colleagues

All Regional Managers must ensure that their teams implement the attached process to assess claims for past medical expenses. All RAF offices are required to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses. The regions must use the prepared template rejection letter (see attached) to communicate the rejection. The reason to be provided for the repudiation will be that the claimant has sustained no loss or incurred any expenses relating to the past medical expenses claimed. Therefore, there is no duty on the RAF to reimburse the claimant. Also attached is a list of Medical Schemes. Required outcome: immediate implementation of the process and 100% compliance to the process. [The defendant's own emphasis.]

13. The directive was the subject of an application for judicial review in the South Gauteng Division of the High Court in *Discovery Health (Pty) Ltd v Road Accident Fund and another* ZAGPPHC 368 (26 October 2022). The Court held that the directive was unlawful, and it was set aside on that basis. A subsequent application for leave to appeal by the defendant was refused on 23 January 2023.

14. The defendant's counsel urged this Court to suspend an order in relation to this aspect of the plaintiff's claim *sine die*, pending the institution of an application for leave to appeal to the Supreme Court of Appeal. She indicated, further, that the defendant was intent upon testing the matter in the Constitutional Court, if necessary.

15. It is common cause that no application has as yet been lodged at the Supreme Court of Appeal. Counsel could not say when it would be done, save to assume that the defendant would follow the prescribed time periods for the launch of such proceedings. She mentioned further, however, that various of the persons involved in the process were ill or injured, and that it was difficult to obtain coherent instructions.

16. Section 17(1) of the Act obliges the defendant to compensate third parties such as the plaintiff for any loss of damage suffered as a result of the negligent or wrongful conduct of the driver of a motor vehicle. The Constitutional Court explained the position as follows in *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at para [25]: "... *the scheme insures road users against the risk of personal injury and their dependants against the risk of their death caused by the fault of another driver or motorist. It has retained the underlying common-law fault-based liability. This means that any accident victim or a third party who seeks to recover compensation must establish the normal delictual elements. The claimant must show that he or she has suffered loss or damage as a result of personal bodily injury or the injury or death of a breadwinner arising from the driving of a motor vehicle in a manner which was wrongful and coupled with negligence or intent.*"

17. It is a well-established principle of our law that the patrimonial damages for which the Road Accident Fund is liable (subject to certain express

exclusion and limitations not relevant to the current matter) is calculated on an ordinary delictual basis. The Supreme Court of Appeal in *Erasmus Ferreira & Ackerman v Francis* 2010 (2) SA 228 (SCA) restated the principle as follows in para [16]: “As a general rule the patrimonial delictual damages suffered by a plaintiff is the difference between his patrimony before and after the commission of the delict. In determining a plaintiff's patrimony after the commission of the delict advantageous consequences have to be taken into account. But it has been recognized that there are exceptions to this general rule.”

18. By way of an introduction to the discussion below, I refer to what the Court stated in *Erasmus Ferreira* at para [15], namely that “according to the principle *res inter alios acta, aliis neque nocet, neque prodest* ('a thing done, or a transaction entered into, between certain parties cannot advantage or injure those who are not parties to the act or transaction'), and had to be disregarded in computing the plaintiff's damages.”

19. The Courts have, on many occasions, held that medical aid scheme benefits are a form of indemnity insurance and should accordingly be disregarded for the purposes of an award for damages, in accordance with the principle of *res inter alios acta*. A number of these authorities were usefully set out in the matter of *Lawson v The Road Accident Fund* (unreported judgment of this Court under case number 12399/2017, delivered on 15 December 2022).

20. In *Zysset and others v Santam Limited* 1996 (1) SA 273 (C) at 278C-D the Court explained that “it is well established in our law that certain benefits which a plaintiff may receive are to be left out of account as being completely collateral. The classic examples are (a) benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and (b) moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion incoming to the assistance of the plaintiff.”

21. In *Thomson v Thomson* 2002 (5) SA 541 (W) at 547H-I the Court stated as follows: “A medical aid scheme is, if not in law then in substance, a form of insurance. One pays a premium against which there may be no claim, or claims less than the value of the premiums, or claims which far exceed the value of the premiums. Were this a claim for damages, whether in delict or in contract, there is little doubt that the defendant would not have been entitled to rely on the payments received from the medical aid scheme.”

22. The Court in *D’Ambrosi v Bane and others* 2006 (5) SA 121 (C) reiterated the principle at para [45]: “... at the time he suffered such injuries, the plaintiff was, and still is, a member of a medical aid scheme, which has, in fact, raised his premiums in return for all-embracing cover. He has not received, nor is it envisaged that he will, in future, receive any benevolent or ex gratia payments from such scheme. There is hence no question that any payments made to him by the scheme are in the nature of deductible social insurance benefits. I am in respectful agreement with Gautschi AJ in the Thomson case ... that a medical aid scheme, such as that of which the plaintiff is a member, is, in substance, a form of insurance. In my view, it is no different from any other form of indemnity insurance which offers cover against injury or damage in return for premium payments.”

23. The decision was confirmed on appeal in *Bane v D’Ambrosi* 2010 (2) SA 539 (SCA).

24. In the specific sphere of Road Accident Fund litigation, the principle has consistently been upheld. In *Rayi NO v Road Accident Fund* [2010] ZAWCHC 30 (22 February 2010) this Court discussed the relevant principles and held at para [17] that the “undertaking given by the plaintiff to Bonitas creates a contingent liability which is enforceable on the happening of some future event. Bonitas’ right of recourse against the plaintiff for reimbursement does not arise until the plaintiff has received payment from the defendant. The defendant’s liability to the plaintiff for the payment of the past medical expenses is not affected by Bonitas’ payment on behalf of the plaintiff.”

25. In *Mooideen v The Road Accident Fund* (unreported judgment under case number 17737/2015, delivered on 11 December 2020) this Court, again, and after setting out the relevant legal basis, confirmed that “... *the settlement by Discovery of the deceased’s past medical expenses, did not relieve the defendant of any of its legal obligations to compensate the plaintiff in her representative capacity for the past medical expenses which the deceased incurred. Discovery’s payment of these expenses was, therefore, an irrelevant collateral transaction with respect of the defendant when dealing with a claim by the deceased estate against the defendant. The defendant is not entitled to raise Discovery’s medical aid scheme indemnification as a defence and therefore benefit from the payment.*”

26. The Court proceeded that “*Plaintiff thus, on behalf of the deceased's estate, in terms of the rules which I have said out of Discovery and the common law of insurance, can recover from the defendant as if there had been no indemnification at all. The recovery made by the deceased estate is a matter between the plaintiff and Discovery and has, therefore, raised res inter alios acta.*”

27. These sentiments were reiterated in the *Discovery Health* case referred to above. The Court emphasised in para [16] that the purpose of the Act was aptly described in *Engelbrecht v Road Accident Fund and another* 2007 (6) SA 96 (CC) at para [23] as primarily to give the maximum protection to persons who suffer loss or damage as a result of the negligent driving or unlawful conduct in the driving of a motor vehicle.

28. On a consideration of the authorities set out above, as well as on a proper interpretation of the various relevant provisions of the Act, the Court concluded at para [29] that the Road Accident Fund was not entitled to seek to free itself of the obligation to pay full compensation to victims of motor vehicle accidents. The August 2022 directive was therefore outside of the authority given by the enabling statute. It was inconsistent with the express provisions of section 17 of the Act, and thus unlawful. The Court elaborated:

“[30] *The social security protection the RAF Act provides is in no way intended to impoverish medical schemes who, were the directive to stand, would face a one*

direction downward business trajectory as a result of their members becoming victims of motor vehicle accidents. The levy paid on fuel provides the funds for payment of compensation to motor vehicle accident victims and nothing in the law obliges medical aid schemes to contribute towards such compensation by the payment, from the time of hospitalisation and treatment of a motor vehicle accident victim, of medical expenses without a reasonable expectation of reimbursement upon settlement of the claimants' claims in terms of the RAF Act.

[31] It is for that expectation that medical schemes enter into agreements with their members and provide relevant invoices of medical expenses incurred to be considered in the calculation of the claimants' claims. Settlements of victims' claim is in full and final settlement. This means that, unless the past medical expenses form part or are included in the settlement amount, medical aid schemes will not be reimbursed for the medical expenses they paid. Worst still, medical schemes would have no standing to recover those expenses due to the claimant's claims having been settled in full and final settlement.

[32] The only way to prevent their loss of expenses incurred for the medical treatment of their client victims of motor vehicle accidents, would be for the medical schemes to institutes concurrent claims against the RAF and in due course seek the consolidation of the hearing of the two matters. The costs of the proceedings will be astronomical and unnecessarily incurred by the RAF which, in terms of the Public Finance Management Act, will constitute wasteful expenditure." [Emphasis added.]

29. As mentioned, an application for leave to appeal against the judgment has been refused, and no further steps have been taken by the defendant.

Conclusion

30. Counsel for the plaintiff contended that, in the light of these decisions, the Court in the present matter had to find that the defendant liable to compensate the plaintiff for past medical expenses paid by Momentum. I agree with his submissions. As the law stands at present, the defendant's liability to a claim for past medical expenses is not affected by the fact that the plaintiff's medical aid has already paid

those expenses. It is clear from the decisions referred to above (in particular those of this Court, in respect of which I cannot find any basis to conclude that they were clearly wrong), that the *res inter alios acta* principle does not permit the defendant to deduct the amounts paid by Momentum from the *quantum* payable to the plaintiff in respect of past medical expenses.

31. In these circumstances, there is no reason for this Court to keep the finalisation of this matter in abeyance for an indefinite period while the defendant gets its house in order. Should the defendant launch an application for the rescission of this judgment, given the defendant's intentions to pursue litigation up to the Constitutional Court in seeking finality on the issue of the payment of medical aid costs, such rescission application would have to be dealt on its own merits in due course. Counsel for the defendant was not able to inform the Court as to what the basis for rescission would be, but that is an issue that this Court is not concerned with at present.

Costs

32. The costs awarded in the action are set out in the order granted.

P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the plaintiff: W. Coughlin, instructed by DSC Attorneys

For the defendant: S. Maduray, instructed by the Road Accident Fund