

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO.: 579/2009

In the matter between:

**ADVOCATE NEIL MUIR PATERSON
OBO BAMBILE NZWANA**

Applicant

AND

ROAD ACCIDENT FUND

First Respondent

JACOB MODISE

Second Respondent

JUDGMENT

MALUSI, AJ

[1] This is an application for the first respondent to provide an undertaking as contemplated in Section 17(4) of the Road Accident Fund Act, 56 of 1996 ("The Act").

[2] The applicant is *the curator ad litem* appointed to act on behalf of Bambile Nzwana ("Nzwana"). The first respondent is the Road Accident Fund. The second respondent is the Chief Executive Officer of the first respondent.

[3] It is common cause between the parties that Nzwana was injured in a motor vehicle collision on 27 June 2006 in Port Elizabeth while at work as a pipe layer on the roadside. On 8 June 2010 this Court ordered (by agreement) per Kroon J that merits be heard separately. The same order provided that the first respondent conceded the merits and agreed to pay Nzwana 100% of his proven or agreed damages.

[4] On 4 August 2010 this Court made the following order amongst the others (by agreement) per Revelas J that:-

“1. The Defendant furnish First Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of future accommodation of, the patient, Bambile Nzwana in a hospital or nursing home, 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 motor vehicle collision on 27 June 2006 after such costs have been incurred and upon proof thereof. (my underlining)

[5] 5.1 Section 17(4) of the Act provides that:-

(4) Where a claim for compensation under subsection (1)-

(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 or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate-

(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or

(ii)

in accordance with the tariff contemplated in subsection (4B)

5.2 A reading of Section 17(4) (a) of the Act reveals that the wording of the order of Revelas J is the same as that in the section save for the inclusion of Nzwana's name, the cause of his injuries and the date those were sustained as underlined in paragraph 4 above.

[6] On 3 December 2010 the first respondent provided the applicant with an undertaking purportedly in terms of Section 17(4)(a) of the Act as ordered by this Court. The relevant portion of the purported undertaking reads:

"NOW THEREFORE the Fund undertakes under Section 17(4)(a) of the said Act to compensate the duly appointed Curator ad Litem, for the costs of future accommodation of the Injured in a hospital or nursing home or treatment of or rendering of a service or the supplying of goods to the said Injured, after the costs have been incurred and on proof thereof, subject to the provisions of Section 36 of Occupational Injuries and Diseases Act, 1993, (ACT 130 OF 1993) from inception being 22nd October 2010."

[7] The applicant's attorneys wrote to the first respondent's attorneys on three separate occasions pointing out that the purported certificate was not in accordance with the order by Revelas J due to the insertion of the proviso in paragraph 6 above. The letters elicited no response.

[8] The issue for decision is whether the proviso amounts to an impermissible non-compliance with the order of Revelas J.

[9] Counsel for applicant submitted that the proviso amounts to an impermissible qualification. The basis for the submission was that the proviso placed more onerous duties on the applicant not provided in the order. He would not only have to provide proof of the costs incurred as required by the order but the proviso compelled him to further prove that such costs have not been previously paid by the Compensation Commissioner , so it was argued.

[10] Counsel for the first respondent submitted that the proviso did not amount to a qualification at all. It was merely a statement of what the law implicitly provided in any event. The proviso was inserted because the undertaking was furnished to applicant before the Court delivered judgment on the amount of damages. He, however, conceded that it would not be permissible to have the proviso after the judgment on the damages. Counsel wisely abandoned the other defences the first respondent had raised on the papers as they manifestly had no merit.

[11] It is necessary to consider the provisions of section 36 of Compensation for Occupational Injuries and Diseases Act 130 of 1993 as amended. The Section provides:

“(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the ‘third party’) being liable for damages in respect of such injury or disease-

- a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and
- b) the Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

(2) In awarding damages in an action referred to in subsection (1)(a) the

court shall have regard to the compensation paid in terms of this Act.

(3) In an action referred to in subsection (1)(b) the amount recoverable shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for this Act.

(4) For the purposes of this section compensation includes the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54(2) or 72 (2) and, in the case of a pension, the capitalized value as determined by the Director-General of the pension, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 52 or 60, and periodical payments or allowances, as the case may be.

[12] It is clear that at best for the first respondent Section 36 above would be relevant where an employee had concurrent claims for compensation and damages. The trial Court would then consider compensation already received by the employee from the Compensation Commissioner. The important fact to note is that it is the trial Court that is compelled to have regard to the compensation already paid and not the employee (applicant). It is thus not necessary for a certificate which is for the benefit of the patient (applicant) to include a reference to what the trial Court must consider.

[13] It is my considered view that the proviso is similar to a clause that this Court in **Baboo v RAF**¹ held was a qualification beyond the ambit of Section 17(4)(a) of the Act. It requires that the applicant does more than simply prove the costs he has incurred as provided in Section 17(4) of the Act. The Baboo judgment was quoted with approval by Jones J in **Vermaak v RAF**². In my judgment, the proviso amounts to a qualification beyond the scope of section 17(4) of the Act.

[14] The distinction that final judgment was still pending on the damages when the

1 SECLD, Case No. 664/02, delivered on 22/08/2003 per Ludorf, J

2 SECLD, Case No 2509/03, delivered on 3/03/2006

proviso was inserted is without merit. The trial Court would in due course have had regard to any payment made in terms of the certificate before deciding on the final award of damages. It is not for the patient to prove what compensation has been made by the Commissioner when he proves costs incurred as provided in Section 17(4) of the Act.

[15] The fact that the order by Revelas J was by agreement is also an important consideration to bear in mind. The effect of the agreement being made a Court Order is that it is then binding on both parties³. The first Respondent, cannot thereafter, unilaterally add any proviso to an undertaking directed by Court especially one that amounts to a qualification. The proviso further specifies an inception date of 22 October 2010. This date was not provided in the order of Revelas J and was certainly not with Applicant's consent.

[16] The last issue to consider relates to costs. Mr Frost prevailed on me to order costs on a punitive scale against the first respondent. Mr Van der Linde made no submissions regarding costs if the first respondent was not successful in its defence.

[17] The primary fact and circumstance in this case relevant to costs, is that the first respondent has not complied with a Court Order (by agreement). It has not provided any explanation for the non-compliance except to advance a legal argument I have found to be without merit. It is trite that a party that fails to comply with a Court order is visited with a costs order on a punitive scale unless exceptional circumstances exist. I have not been referred to any by Respondent's Counsel and none could be found on the papers.

³ Marine and Trade Insurance Co Ltd v Katz NO1979(4) SA 961 (A) per Trollip JA at 971A-B

[18] I accordingly make the following order:-

1. The first respondent is to provide an undertaking in compliance with the order of this Court dated 4 August 2010 within 14 days of this order.
2. The first respondent is ordered to pay the costs of this application on an attorney and client scale.

T. MALUSI

ACTING JUDGE OF THE HIGH COURT

APPEARANCE:

ADV A FROST : For Applicant

Instructed by:

Roelofse Meyer Inc

Adv Van De Linde Sc : For Respondents

Instructed by:

Boqwana Loon & Connellan

Date Heard : 19 APRIL 2012

Date Delivered : 26 APRIL 2012