IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 2916/2013
Date heard: 17 October 2016
Date delivered: 25 October 2016

REPORTABLE

In the matter between

NICOLA BARNARD N.O. obo
KHANYISE GIVEN CAKWEBE — Plaintiff

And

THE ROAD ACCIDENT FUND — Defendant

JUDGMENT

GOOSEN, J.

1. Action was instituted by the plaintiff for damages arising from injuries suffered in a motor vehicle collision which occurred on 11 October 2008. The defendant conceded liability for 80% of such damages as the plaintiff would be able to prove and an order to this effect was granted by this court on 4 February 2015. When the matter came to trial on 17 October 2016 I was informed that the parties had resolved all issues regarding the quantum of the plaintiff's claims except one issue. That related to the ambit of the defendant's tendered undertaking in terms of s 17(4) (a) of the Road Accident Fund Act, 56 of 1996 (hereinafter the RAF Act).

2. It was indicated that the plaintiff's claims included a claim for the costs of the future employment of a domestic assistant. The claim, as formulated in amended particulars of claim, was quantified in an amount in excess of R1, 7 million. The defendant, whilst not conceding the quantum of its liability, had tendered an undertaking to provide for the future costs associated with the provision of such domestic assistance. The plaintiff however had formed the view, based upon a judgment recently delivered in the Free State Division, that an undertaking in terms of s 17(4) (a) could not cover the provision of such services and, accordingly, that it would be necessary for the plaintiff to prove his claim for payment of a lump sum award to cover such future costs.

3. The parties also indicated that proceedings were pending for the appointment of a *curator bonis* to the plaintiff and that the future costs associated with the appointment of a *curator bonis* were similarly affected by the interpretation placed upon s 17(4)(a) by the aforementioned judgment.

4. In the light of this the parties agreed that an order be made in respect of all of the settled issues and that this court should consider and resolve the dispute regarding the ambit of s17 (4) (a). It was agreed that if it should be found that s17(4)(a) does not permit an undertaking to cover the future costs of the provision of a domestic assistant, then in that event the issue as to the nature and quantum of the defendant's liability for such costs should be postponed for trial in due course. If it is found that s 17(4(a) does permit of such undertaking to be given then the existing order relating to the undertaking should be amended to incorporate reference to the future costs of a domestic assistant. It was agreed also that in that event the undertaking should similarly reflect the defendant's liability for the costs of the services of a *curator bonis.*

5. In the light of these agreements the issue to be determined is essentially a legal one. It is, for this reason, unnecessary to deal with any underlying factual issues. Although the relevant claim for the costs of a domestic assistant as formulated in the amended particulars frames the claim as one for both a 'caregiver and domestic assistant', I was informed that for present purposes it can be accepted that the claimed services are purely of a domestic nature, i.e. that they do not involve the provision of any health related services.

6. It is on this basis that the plaintiff contends that the claim is struck by the judgment of Opperman AJ in *Khomotso Polly Mphirime v Road Accident Fund*[1] (the *Mphirime* judgment) since that judgment found that the nature of the 'services' envisaged by the section are 'health related services' for which provision is made in the tariffs referred to in s 17(4B) of the RAF Act. The defendant however submitted that the *Mphirime* judgment is wrongly decided inasmuch as the interpretation of s 17(4) (a) favoured in *Mphirime* does not accord with the underlying purpose of the section and is at odds with long established practice in this, and other Divisions, to provide for claims such as that of the plaintiff by way of an undertaking given in terms of s 17(4) (a). It was submitted that the *Mphirime* judgment was considered but not followed in a subsequent judgment in the KwaZulu Natal Division, in the matter of *Wilberforce Thembelani Ndawonde v Road Accident Fund*.[2]

[1] Case No 916/2014, Free State Division, delivered on 25 February 2016
[2] Case No 3460/2013, KwaZulu Natal Division, Pietermaritzburg, delivered on 22 July 2016

7. Section 17 of the RAF Act was substituted by s 19 of the Road Accident Further Amendment Act, 19 of 2005 which came into force on 1 August 2008. [3] The relevant portions of the section read as follows:

> (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 an agent to furnish an 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) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d),
>
> in accordance with the tariff contemplated in subsection (4B);
>
> (b) ...
>
> (c) ...
>
> (4A)...
>
> (4B) (a) The liability of the Fund or an agent regarding any tariff contemplated in sub-section (4) (a), (5) and (6) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act 61 of 2003), and shall be prescribed after consultation with the Minister of Health.
>
> (b) The tariff for emergency medical treatment provided by a health care provider contemplated in the National Health Act, 2003 –
>
> (i) shall be negotiated between the Fund and such health care providers; and
>
> (ii) shall be reasonable taking into account factors such as the cost of the treatment and the ability of the Fund to pay.
>
> (c) for emergency medical treatment the tariff contemplated in paragraph (a) shall apply.

8. In *Law Society of South Africa and others v Minister for Transport and others* [4] the Constitutional Court considered the constitutionality of the scheme of compensation introduced by the amendments effected to the RAF Act by the coming into force of Act 19 of 2005. The only aspect relevant for present purposes concerns that aspect of the compensation scheme which limits the liability of the Fund in respect of the payment of the costs of health services, i.e. the limitation of liability with reference to a tariff or tariffs as may be prescribed by the Minister.

---

[3] Proclamation R29 in *GG* 31249 of 21 July 2008

[4] 2011 (1) SA 400 (CC)

9. In regard to this aspect the Constitutional Court was faced with a challenge to the constitutionality of Regulation 5(1)of the medical tariff prescribed by the Minister in terms of s 17(4B) of the Act. For reasons not germane to the present enquiry the court found that the Regulation, which prescribed a particular tariff which did not adequately provide for services in state hospitals for quadriplegic patients, was inconsistent with the Constitution and struck it down.

10. The order of the Constitutional Court provided that until the Minister prescribes a new tariff in terms of s 17(4B) a party entitled to compensation is to be compensated as if he or she had been injured before the Road Accident Fund Amendment Act 19 of 2005 came into operation.[5]

11. The Amendment Act 19 of 2005 inserted into s 17(4) (a) subsection (ii) and the words following that subsection, namely '*in accordance with the tariff contemplated in subsection (4B)*'. It also introduced a similar qualification in subsections (5) and (6) and inserted subsections (4A) and (4B) into s 17.

12. As was noted by the Constitutional Court, prior to these amendments the liability of the Fund to compensate a third party was unlimited. The limitations introduced by s 17 for pecuniary loss included a limitation of the Fund's liability 'for costs of medical and health care services' which were to be based upon the tariffs contemplated by s 17(4B).[6]

---

[5] Paragraph (e) of the Constitutional Court order (*supra* at p 439C-D) reads as follows:

> Until the Minister of Transport prescribes a new tariff for health services in terms of s 17 (4B) (a) of the Road Accident Fund Act, a third party, who has sustained bodily injury and whom the Road Accident Fund is obliged to compensate as contemplated in ss 17(4)(a), 17(5) and (6) of the Road Accident Fund Act, is entitled to compensation or health services as if he or she had been injured before the Road Accident Fund Amendment Act 19 of 2005 came into operation.

[6] *Law Society of SA v Minister for Transport* at par[27] (p.412D)

13. The Constitutional Court was not required to consider the ambit of s 17(4) (a) in the light of the amendment. It considered only the effect of the prescribed tariff in relation to the third party's claim for compensation. The judgment therefore does not provide direct assistance in the interpretation of the scope and ambit of the undertaking for which s 17(4) (a) provides.

14. In seeking to understand the ambit of the undertaking the starting point, in my view, must be to determine the purpose of the section.

15. The matter of *Road Accident Fund v Arendse NO* [7] concerned an appeal against an order declaring the Fund liable to compensate a party for the costs incurred in the administration of an undertaking furnished in terms of art 43 (a) of the Schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.

16. Article 43(a) was the predecessor to s 17(4) (a). Its wording, save for the reference to the Multilateral Motor Vehicle Accidents Fund (the predecessor of the current Fund), is identical to s 17(4) (a) prior to the amendments referred to above.

17. The court set out the legislative background to the introduction of the mechanism of providing an undertaking and explained its purpose in the following terms.

> Before the introduction of the predecessor to art 43 (a), a court hearing an action for damages in a running-down case would have had to apply the 'once and for all principle'. This obliged it to award then and there (and consequently to assess and quantify) in one and the same proceeding any claim for damages proved to have been suffered by a plaintiff. No matter how anxiously a court peered into the future when assessing future

[7] 2003 (2) SA 490 (SCA)

> hospital or medical expenses, or the costs of goods and services, it risked awarding either too much or too little. Yet, nothing could be left over in order to see how things turned out. Then came s 21 (1C) of the Compulsory Motor Vehicle insurance Act 56 of 1972. Its purpose was to take the guesswork out of the assessment of damages of this kind. Since the introduction of the amendment such damages could be paid as damage eventuated.
>
> It is against this background that art 43 (a) must be interpreted. Its purpose, like that of its predecessor <u>and of its successor</u>, was to help solve the quantification problem, nothing more. It could be invoked by the MMF (or its appointed agent) in every case in which there was a claim for compensation under art 40 which included a claim for the cost of future accommodation of the plaintiff in a nursing home or for (medical) treatment or for the supply of goods or services. Art 43 (b) served the same purpose in relation to an award for loss of future earnings or support. If there was a claim or claims of this kind the MMF (if it accepted liability or was adjudged liable) might in its sole discretion decide to tender an undertaking instead of paying damages to the plaintiff in a lump sum.[8]
> (Emphasis added, footnotes omitted)

18. The underlying purpose of s 17(4) is to avoid all of the obvious difficulties and risks associated with the quantification of future loss – those imponderables which are impacted by contingencies – which are incapable of precise determination in advance. It is a purpose which has been consistently promoted throughout the legislative history of statutory schemes designed to compensate the victims of road accidents since s 21(1C) was introduced into Act 56 of 1972 with effect from 1 September 1978.[9]

19. Section 17(4)(a), like its predecessor art 43(a), contemplates the provision of an undertaking in relation to three categories of future loss, namely the future costs of accommodation in a hospital or nursing home; medical treatment; and the rendering of a service or the supplying of goods to the person concerned.

20. In defining the nature of the services contemplated by both art 43(a) and s 17(4)(a) courts have consistently considered the wording used to be sufficiently wide to include the supply of services other than medical or health related

[8] At par [8] and [9]
[9] s 21(1C) was introduced by s 8 of Act 69 of 1978. See *Arendse NO* at fn 5

services. Thus in *Brink v Guardian Nasionale Versekering Bpk,*[10] which dealt with art 43(a), the phrase 'a claim for costs of a future rendering of a service in terms of the article' was held to be wide enough to include the appointment of a person to assist the claimant in his farming activities.

21. In *Reyneke NO v Mutual & Federal Insurance Co Ltd*[11] it was held that the costs of a future rendering of a service, as then utilised in s 8(5)(a) of the Motor Vehicle Accidents Act 84 of 1986, was sufficiently wide to include the costs of a *curatrix bonis* appointed to administer the estate of the claimant.

22. It is with the underlying purpose of the provision and the manner in which it, and its predecessor provisions, have been interpreted that I turn to consider the judgment in the *Mphirime* matter.

23. In that matter, as in this, the nature of the claim at issue was for the costs of appointment of a domestic assistant. The court's reasoning is set out as follows:[12]

> The wording of section 17(4) as it refers to section 17(4B) and as section 17(4B) refers to section 17(4)(a), explicitly denotes and states that the liability of the Fund or and agent be based on tariffs for <u>health services</u> provided by <u>public health establishments</u> contemplated in the <u>National Health Act 61 of 2003,</u> (NCA). No other service is indicated or defined; rendering of service can only mean health services. Section 17(4) (a) refers to 'rendering of service' in a connected sentence structure to hospitals and nursing homes:
>
> "...a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her..."

24. The court then goes on to state that domestic assistance does not fall within the classification of health services.

[10] 1998 (1) SA 178 (O)
[11] 1992 (2) SA 417 (T) at 420J
[12] See par [9]

25. The learned judge does not address the underlying purpose of s 17(4) (a), nor its interpretation or that of its predecessor. The interpretation is confined to a reading of the words employed in the section without consideration of their contextual meaning. What is also absent from the judgment is any engagement with the legislative history, in particular the nature of the amendment by which reference to tariffs was introduced through the introduction of s 17(4B) of the RAF Act.

26. As already indicated Act 19 of 2005 introduced subsection (ii) and the qualification phrase 'in accordance with the tariff contemplated in subsection (4B)'. The question to be asked is what was the purpose of the introduction of these words to the section? Does the phrase serve to qualify the liability of the Fund in relation to all of the categories of future loss for which s 17(4) (a) makes provision or does it serve to determine the quantum of the liability in relation to such services as are regulated by tariffs provided for by the National Health Act as may be prescribed by the Minister?

27. The answer to this question, it seems to me, is to be found firstly in the wording of subsection (4B). It states that the

> '...liability of the Fund...regarding any tariff contemplated...shall be based on the tariffs for health services....'

28. This suggests, as the plain meaning of the words indicates, that in respect of such treatment or services as are subject to tariff regulation in terms of the National Health Act, the liability of the Fund is to be determined in accordance with the prescribed tariff or tariffs. To construe the qualification as determining the nature of the service as covered by the section would restrict the ambit of s 17(4)(a) only

to the provision of health services, contrary to long established interpretation of the section and its legislative predecessors.

29. The effect of such a restrictive interpretation would be to confine the purpose of the provision only to the future provision of medical services and treatment and leave all other recognised and accepted categories of future loss to be determined as lump sum payments of patrimonial loss, subject to the vagaries and uncertainties that the legislature has sought to address by the introduction of the provision. This would require trial proceedings involving expert evidence to determine, amongst other things, the present value of a future liability. The provision of an undertaking serves not only to avoid the difficulties of quantification of such claims, it serves also to provide a claimant who will require future treatment or the rendering of services with a measure of security of access to such services that payment of a lump sum award cannot provide. This, in my view, serves to protect the dignity of claimants. That the statutory scheme of compensation for victims of road accidents serves as a form of social security is well recognised. An interpretation of s 17(4) (a) which is consonant with the values of human dignity and equality must be favoured if there is any ambiguity in the proper construction to be placed on the section.

30. In my view, had the legislature intended as significant and far-reaching an amendment of s 17(4) (a) as is suggested by the *Mphirime* judgment then it would have effected it in clear and unambiguous terms. This it has not done.

31. I am not persuaded that *Mphirime* is correctly decided. I am, in any event, not bound by it. In the *Ndawonde* matter the court rejected the strict interpretation of a 'service' as being confined to health services and found that an undertaking

made in terms of s 17(4) (a) may extend to the provision of services by a caregiver.[13] This approach accords with that which has informed orders routinely made in this Division in matters involving the undertaking to pay for the costs of the rendering of services other than those that may strictly be described as 'health services'.[14]

32. In the light of what is set out above I find that the phrase '*in accordance with the tariff contemplated in subsection (4B)*' as introduced in s17 of the RAF Act by Act 19 of 2005, as read with the provisions of subsection (4B), serves only to restrict the liability of the Fund in relation to such services as are regulated by a prescribed tariff and does not confine the ambit of an undertaking only to such services. The wording of the section is wide enough to cover liability for the supply of goods or the rendering of services the provision of which is not regulated by a tariff promulgated in terms of the National Health Act, such as the services of a domestic assistant and / or the costs of a *curator bonis* appointed to administer the estate of a claimant.

33. In the light of this finding it is necessary to amend the terms of the order incorporating the undertaking furnished by the defendant, as was agreed, in order to properly record that it covers both the costs attendant upon the future employment of a domestic assistant and the full costs of a *curator bonis*, if appointed. It was agreed by the parties that no additional costs were incurred in

---

[13] *Ndawonde* (supra) at par [7]

[14] Cf. *Alla v Road Accident Fund* [2013] JOL 29851 (ECP) where the undertaking included the costs of a domestic employee; *Shirley van Zyl v Road Accident Fund* Case No CA 243/2007, Eastern Cape Division, Unreported, delivered 19 October 2008 where a similar order was made; *Pieter van Zyl v Road Accident Fund* Case no 1349/2012 Eastern cape Division, delivered 5 June 2013 where the costs of a *curator bonis* were included in the s 17(4) (a) undertaking.

presentation of argument in respect of the issue to be determined and that the costs order which was incorporated in the order of 17 October 2016 will suffice.

34. In the result paragraph 3 of the order made on 17 October 2016 is amended to read as follows:

> '3. That the Defendant is ordered to furnish an undertaking in terms of Section 17(4)(a) of Act 56 of 1996, limited to 80%, for the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff, such services to include the services of a domestic assistant, as a result of the injuries which the Plaintiff sustained in the collision on 11 October 2008, after the said costs and expenses have been incurred and upon proof thereof. The undertaking shall include the costs of a *curator bonis*, if appointed, as may be allowed by law provided that the costs of the *curator bonis* shall not be limited to 80%.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Plaintiff
Adv. P. H. Mouton
Instructed by Daniel Saks Inc.

For the Defendant
Adv. A. Frost
Instructed by BLC Attorneys