

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

Case No: 1881/2012
Date Heard: 13 June 2019
Date Delivered: 22 August 2019

In the matter between:

NICOLA BARNARD N.O. obo D MNCAM

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

Ronaasen, AJ

Introduction

1. On 13 June 2019, in respect of this action, I made an order ("the order") by agreement between the parties, they being the plaintiff, Nicola Barnard, an advocate of this court, in her representative capacity as curator *ad litem* to Mr Douglas Mncam ("the patient") and the defendant, the Road Accident Fund.
2. On 11 September 2007, in New Brighton, Port Elizabeth, the patient had been injured, when a motor vehicle collided with him while he was a pedestrian ("the collision").

3. As a result of the injuries the patient sustained in the collision he suffered fractures of his right ankle, a fracture to his cervical area, a soft-tissue injury to his right hip, a head injury, with lacerations and bruising of the face and abrasions of his left thigh and his elbows.
4. In terms of the order the defendant was, *inter-alia*:
 - 4.1. declared to be liable for 100% of the damages suffered by the patient as a result of the injuries sustained by him in the collision;
 - 4.2. directed to pay compensation to the patient in the sum of R400 000.00 in settlement of his claim for damages;
 - 4.3. further directed to furnish the patient with an undertaking ("the certificate") in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the Act") in terms of which the defendant undertook to pay 100% of the costs of future accommodation incurred in respect of the patient in a hospital or nursing home or in respect of the future treatment or rendering of a service to the patient, or the further supplying of goods to him, including the costs of the services and treatment referred to in the medico-legal reports filed by the plaintiff to date, arising from the injuries sustained by the plaintiff in the motor vehicle collision concerned, after such costs had been incurred and upon proof thereof.

5. I reserved judgment on the question as to whether the costs covered by the certificate would include:
 - 5.1. the reasonable costs on a party and party basis in respect of an application for the appointment of a curator to the estate of the patient; and
 - 5.2. the fees of the appointed curator to the estate of the patient for his/her services as such, including the cost of providing security for the due fulfilment of his/her functions.
6. Ms Leanne Ellis, an advocate of this court, was appointed as curator *ad litem* to the patient to report to this court as to whether the patient required a curator to assist him in his action, against the defendant and, furthermore, whether in due course he would require the appointment of a curator to his estate. In respect of both questions she concluded in the affirmative, to the following effect:
 - 6.1. the patient was completely unable to understand and constructively engage in the litigation process;
 - 6.2. he was unable to manage his own affairs;
 - 6.3. the available medical evidence supported the appointment of a curator to assist the patient in the litigation and a curator to manage his estate.

7. The issues, described in paragraph 5, above, on which I reserved judgment, were argued, on the basis that it was common cause that:
 - 7.1. the patient would require the appointment of a curator to his estate, as he was incapable of managing his own affairs; and
 - 7.2. the mental inability from which he suffered and which required the appointment of a curator to his estate was not a result of the injuries he had sustained in the collision, but was rather the result of a pre-existing mental disability.
8. In the particulars of claim (as amended) it was claimed on behalf of the patient that one of the *sequelae* of the injuries sustained by the patient in the collision was that he required the assistance of a curator to his estate, particularly to manage the award of compensation achieved in this action. It is not disputed that the patient, pre-collision, would have required a curator to his estate if indeed he had any estate to manage. Prior to the collision the patient was indigent and was cared for by his family. The sole asset in his estate is the award for damages he has now obtained in this action against the defendant.
9. The defendant contends that the necessity for the appointment of a curator is not attributable to the injuries suffered by the patient in the collision and that it should therefore not be liable for payment of the costs of the curator.

10. The issues on which I reserved judgment were fully argued before me and I am indebted to counsel for the parties for their helpful submissions and the authorities to which they referred me.

Legal principles

11. An award for damages is designed to compensate a claimant for loss or injury suffered. **Damages - H B Klopper, 17, para 2.2.1.1** and **The Law of Delict in South Africa – M Loubser (ed) and R Midgley (ed) - Third Edition, 488, para 34.2.1.**

12. In **Damages (supra)** the following is stated at **para 2.13.1:**

“A well-established rule of law states that a wrongdoer must take his/her victim as he finds him/her. This includes the victim’s peculiar physical and psychological infirmities. A wrongdoer cannot rely on the victim’s inherent infirmities to escape any increased liability resulting from such infirmities.”

13. In **Law of Delict (supra)** at **para 7.4** the following remarks by **Boberg** are quoted with approval:

“The so-called ‘weak heart’ and ‘thin skull’ cases are sometimes regarded as inimical to the application of the foreseeability test to the consequences of conduct. For the defendant is not liable for unforeseeable additional harm suffered by the plaintiff as a result of a pre-existing physical condition that renders him more vulnerable to injury It is submitted that

the rule pertains to the *extent* of the harm suffered by the plaintiff, which need not be foreseeable, and therefore coexists peacefully with the foreseeability test.”

14. The fact that a plaintiff is peculiarly prone to more excessive injury is not relevant to a decision as to the extent of a defendant’s liability. **Boswell v Minister of Police and Another 1978 (3) SA 268 (E) at 272G.**

15. In respect of causation a plaintiff bears the onus, on a balance of probabilities, to prove that the *sequelae* of his injuries must be attributed to the injuries sustained as a result of the delict. Once a plaintiff has proved this he/she would be entitled to the damages he/she can prove. **Damages (supra) at para 2.13.3. Minister of Finance and Others v Gore 2007 (1) SA 111 (SCA) para [32].** See also **Minister of Police v Shosana 1977 (1) SA 31 (A) at 35C** where it was stated that the test as to whether a defendant was liable to a plaintiff as the result of his negligent conduct was whether, but for the negligent act or omission the harm in question (in this case the necessity for the appointment of a curator) would have occurred. A further question, which can be posed is whether the negligent conduct materially contributed to the result (the necessity to appoint a curator). **The Law of Delict (supra) at para 6.6.**

16. A plaintiff is entitled to fair compensation for the damages he suffered. The following passage from **Reyneke N.O. v Mutual & Federal Insurance Co Ltd 1992 (2) SA 417 (T) at 419I** is particularly apposite in this case:

"If the appointment of a *curator bonis* is an unavoidable result of the injuries, then the costs of such *curator*, by which costs the damages will be diminished, must be taken into account in the award, otherwise it will not amount to fair compensation."

Discussion

17. The central question to be answered is whether the appointment of a curator to the estate of the patient is an unavoidable result of the injuries he sustained in the collision. In my view, on the application of the authorities referred to above, this question must be answered in favour of the patient.
18. As a result of the injuries sustained by the plaintiff in the collision, he achieved a substantial award for damages, which, for the first time, vested him with an estate. One of the *sequelae* of his injuries was that he required a curator to his newly acquired estate as he was not able to manage his own affairs. But for the negligent act which caused his injuries the patient would not have required a curator. Alternatively, the negligent act materially contributed to such requirement.
19. The only source of funds available to the patient to compensate a curator, in the event of the defendant not being ordered to pay these costs, would be the award for damages. The only reason why the patient finds himself in this position is the collision and the injuries sustained by him as a result. As postulated in the **Reyneke** judgment if the patient were obliged to utilise his award to pay a curator his award will be concomitantly diminished and the award would, thus, not amount to fair compensation.

20. The fact that the injuries sustained by the patient in the collision would otherwise not have required the appointment of a curator to his estate, in my view, does not alter matters. In terms of settled law, the defendant must take the patient with his peculiar psychological infirmities. Those infirmities confirm his inability to manage his own affairs.
21. The necessity for the appointment of a curator to the patient's estate accordingly remains the unavoidable result of the injuries he sustained in the collision. Because he is psychologically infirm he requires a curator to assist in the management of his estate, which necessity eventuated as a result of the injuries sustained in the collision. If the defendant were not to be directed to pay the attendant costs the patient would not have received fair compensation for the injuries he sustained.

Conclusion

22. I, therefore, conclude that the costs covered by the certificate shall include the costs attendant on the appointment of a curator to the estate of the patient.
23. Thus, I make the following order:
- 23.1. The costs covered by the certificate shall include 100% of:
- 23.1.1. the reasonable costs, on a party and party scale, in respect of the application to be made for the appointment of a curator to the estate of the patient; and

23.1.2. the charges of the appointed curator to the estate of the patient, such charges to include the costs incurred by the curator to furnish security for the due fulfilment of his functions as curator, if he/she is directed to furnish such security by this court.

23.2. The defendant is ordered to pay the plaintiff's costs of the hearing at which the abovementioned issues were argued before me.

O.H. RONAASEN
ACTING JUDGE OF THE HIGH COURT

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