

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

CASE NO.: 3806/2018

In the matter between: -

KARLI VAN DER WESTHUIZEN

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

NORMAN J:

[1]. The issue before me is a very narrow one. It involves an enquiry into whether or not the defendant is liable to compensate the plaintiff for past medical and hospital expenses incurred, where such expenses were paid on her behalf by GEMS Emerald Medical Aid ("GEMS"). The Defendant contends that because the plaintiff did not pay for those expenses, she did not incur any loss to warrant compensation. All the other damages relating to, *inter alia*, general damages and future loss of earnings were settled on 24 November 2020. Mr Frost appeared for the plaintiff and Ms Phillips for the defendant.

[2] Prior to the commencement of the trial, plaintiff sought an amendment to increase the initial amount of R100 000.00 for past medical and hospital expenses to R182 518.73. There was no objection to that amendment and it was accordingly granted.

[3] The parties had also prepared a Rule 37 Minute which recorded certain admissions as follows:

'PAST MEDICAL AND HOSPITAL EXPENSES

1. The parties confirm that the only outstanding issue is plaintiff's claim for past medical and hospital expenses in the sum of R182 518.73.

2. The parties record that on 24 November 2020 the above Honourable Court in the matter before the Honourable Deputy Judge President Van Zyl, issued an Order of Court and in respect of paragraph 1 thereof, reads:

"1. That the Defendant pay Plaintiff 100% of her damages, as agreed upon between the parties, arising from the bodily injuries sustained by Plaintiff in the motor vehicle accident which occurred on 30 July 2015, and at A[...] Street, D[...], Eastern Cape."

3. Plaintiff records that she intends to amend paragraph 10.4 of her Particulars of Claim dated 5 October 2020 to read as follows:

"10.4. Past Medical and Hospital Expenses R182 518.73

10.4.1 Plaintiff provided Defendant with supporting vouchers for past medical and hospital expenses paid by GEMS EMERALD Medical Aid in respect of Plaintiff.

10.4.2 Plaintiff incurred the aforesaid past medical and hospital expenses arising out of the aforesaid collision.

10.4.3 The aforesaid past medical and hospital expenses were necessary and have been reasonably incurred."

4. Defendant admits plaintiff is a member of the GEMS EMERALD Medical Aid (the Scheme).

5. Defendant admits in terms of the policy provisions regulating Plaintiff's membership of the Scheme, the Medical Aid was obliged to pay the hospital expenses and medical treatment received by Plaintiff in the consequence of her injuries.

6. Defendant admits the past medical and hospital expenses in the sum of R182 517.73 were incurred in respect of Plaintiff who received medical treatment and incurred expenses in respect of hospitals and other service providers.

7. Defendant admits that the sum of R182 518.73 for past medical and hospital expenses have been reasonable and necessary in the treatment of Plaintiff injuries.

8. Plaintiff submits that all the supporting vouchers were paid by GEMS EMERALD Medical Aid in respect of Plaintiff. Defendant has requested a schedule from the medical aid."

[4] Defendant also sought an amendment to its plea as follows:

"4 AD PARAGRAPH 10.4

4.1 Defendant has assessed the Plaintiff's claim for past medical and hospital expenses and established that the fair and reasonable accounts for treatment which is collision-related amounts to R182 518.73.

4.2 The Defendant is not certain which accounts assessed in the sum of R182 518.73 have been paid by the Plaintiff's medical aid scheme, and which amounts Plaintiff has paid and settled herself, as Defendant has been provided with medical accounts, but not a medical schedule to ascertain the correct sum which was paid by the medical aid scheme.

4.3 Defendant is prepared to pay the Plaintiff for any proven sum that the plaintiff incurred and directly paid herself.

4.4 Defendant denies liability for any amount paid by the Plaintiff's medical aid scheme, as she has thus not suffered any loss for those accounts which in terms of her medical scheme contract her medical scheme would have covered."

[5] Similarly, there was no objection to that request and the amendment was granted.

[6] Plaintiff testified that she had flown from Cape Town in order to attend trial and she was returning in the evening at 19H00. She confirmed that the amount of R182 518.73 was for past medical and hospital expenses which she incurred as a result of the accident. She further confirmed that, that amount was paid by the medical aid GEMS. She testified that her mother was registered as the main member on the medical aid. Her mother had attended court in the morning but was later excused by both parties. She was not cross – examined by the defendant. Plaintiff closed her case. Defendant indicated that it had no witnesses to call, and it closed its case.

[7] During Mr Frost's argument, he made a submission that made it necessary to establish certain facts from the plaintiff. She was recalled to clarify one aspect that related to the person who was a main member who paid GEMS premiums. Her evidence was that at the time of the accident her mother paid GEMS and she started paying premiums from February 2022. There were no questions posed to her on behalf of the defendant in relation to this aspect.

[8] Mr Frost relied on two judgments of this Division, one penned by the Deputy Judge President Van Zyl in the matter of *Noxolo Lynette Malgas v Road Accident Fund*¹. He also referred the Court to another decision of this Division in the matter of *Morne van Heerden v Road Accident Fund* by Rugunanan J². In both cases the defendant had raised defences similar to the one raised in this case, and they were rejected. The defendant was, in both cases, found liable to pay the plaintiff for past medical and hospital expenses either as proven or agreed.

[9] He submitted that the plaintiff's evidence is clear and she had proved that the medical expenses in the amount of R182 518.73 had been incurred. Those expenses were admitted by the defendant. The fact that the defendant was seeking a schedule to indicate the costs that were paid by the plaintiff and those paid by the medical aid, is irrelevant, because the fact of the matter is that they were all incurred

¹ Case No. 126/2020 (ECG) Heard 25 November 2022 Delivered 1 December 2022.

² Case No. 845/2021 (ECG) Heard 08 September 2022 Delivered 04 October 2022.

in relation to the injuries sustained by the plaintiff. He further submitted that the burden of proof was on the defendant because it was not for the plaintiff to prove that those costs were justified for the medical aid to pay them. It was for the defendant to lead evidence to deal with that aspect.

[10] Ms Phillips, on the other hand, submitted that the defendant's position is that the plaintiff says the defendant must pay R182 518.73 for past medical and hospital costs incurred as a result of the injuries sustained by her and she wants that money paid back to her. She submitted that the defendant's attitude is that if the plaintiff incurred those costs personally then she would be entitled to payment, but if it was the medical aid then she is not entitled to payment because nothing was paid out of her pocket.

[11] She could not refer this court to any authority or legal instrument that supports her submissions in this regard.

Discussion

[12] It is common cause that the plaintiff was born on 30 April 1998 and when she sustained injuries in a motor collision on 30 July 2015, she was 17 years old. She was a child in terms of section 1 of the Children's Act.³

[13] In the amended plea, the defendant admits that the issue of liability was settled between the parties in terms of a court order that was granted on 24 November 2020. It is in that Order that general damages and costs relating to experts were settled between the parties. The Order in paragraph 1 reads:

"1. That the Defendant pay Plaintiff 100% of her damages, as agreed upon between the parties, arising from the bodily injuries sustained by Plaintiff in the motor vehicle accident which occurred on 30 July 2015, and at A[...] Street, D[...], Eastern Cape. . . ."

³ Children's Act No.38 of 2005

[14] Defendant agreed with the plaintiff on the amount of the medical expenses incurred. It further admitted that those expenses were related to the injuries sustained by the plaintiff as a result of the accident. Furthermore, it admitted that those medical expenses were reasonable and necessary. This means that in the defendant's eyes those expenses were justifiable. That, in my view, ought to have been the end of the matter, however, the defendant persisted in the issue set out in the first paragraph.

[15] The defendant is a creature of statute. Whatever defense it puts up must, at the very least, be located within the empowering provisions or the limitations and/or exclusions provided for either in sections 17 or 18 or 19 of the Road Accident Fund Act ⁴. Ms Phillips could not direct the Court to any provision in support of the defendant's contention. That, in my view, failed to meet the threshold set out in ***Prinsloo v Woolbrokers Federation Ltd***⁵ where the Court found that while a pleader's first duty is to allege the facts upon which he relies, his second duty is to set out the conclusions of law which, he claims, follow from the pleaded facts. Facts and conclusion of law must, however, be kept separate.⁶ As aforementioned, the defendant did not advance any conclusions of law upon which its amended plea was premised.

[16] Of importance herein is that the issue of liability was admitted and therefore all that the plaintiff needed to do at this point was to prove that the costs in relation to past medical and hospital expenses were indeed incurred. The plaintiff succeeded in doing so. As aforementioned the plaintiff was a minor when she sustained the injuries. Her mother deemed it fit to be a member of a medical aid scheme to take care of her daughter when in need. The submission that the plaintiff must have paid out of her own pocket to qualify for compensation, is with respect, unsound. It loses sight of the fact that the plaintiff was a minor at the time and was dependent on her mother. Her mother had a right to do whatever she deemed appropriate to ensure that, upon her injury, she received adequate medical care and treatment.

⁴ Act 56 of 1996.

⁵ 1955 (2) SA 298 (N) at 299E.

⁶ Erasmus page B1-130A under Rule18

[17] I accordingly find that the payment made by the medical aid towards the plaintiff's past medical and hospital expenses does not excuse the defendant from its obligation to compensate the plaintiff for those expenses. Secondly, the defendant had been ordered to pay 100% of plaintiff's damages as agreed between the parties as aforementioned. The concessions made by the defendant as recorded in the minute, lead me to conclude that, the defendant by pursuing the defense recorded in its amended plea seeks to render those concessions nugatory.

[18] *Erasmus Superior Court Practice*⁷ when dealing with offers of settlement of offers to settle litigation in its commentary states the following:

'The present procedure is less cumbersome, involves less bureaucratic complexity, than its predecessor. If the defendant fail to perform in terms of an offer or tender which has been accepted the plaintiff is entitled to apply for judgment. The rule is, therefore, designed, to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of such litigation. The rule is there not only to benefit a particular defendant, but for the public good, generally, as well.⁸ Courts should take account of the purpose behind the rule and not give orders which undermine it⁹.'

[19] In *Gusha v Road Accident Fund*¹⁰ the Supreme Court of Appeal stated the following in paragraphs 14 to 15 F -H:

'[14] In these circumstances the respondent, by conceding the 'merits' and accepting liability for the damages still to be proven, which the (appellant) has suffered as a result of the bodily injuries he sustained in the accident accepted liability without qualification for whatever damages the appellant had suffered as a result of his injuries, subject of cause to proof of those injuries and the damages that ought to be awarded. There is in my view, no room for the respondent's argument that its acceptance of liability was limited and did not relate to the full extent of the appellant's loss. There can also be no question of the respondent having sought to

⁷ At page B1 2239.

⁸ *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 23A-B.

⁹ *Naylor* (supra) at pages 23 B-C.

¹⁰ 2012 (2) SA 371 (SCA) at 376 H-377A and 377C-E.

limit its liability by reserving the right to raise an apportionment which it had not considered and on which it did not intend to rely.

[15] The respondent's unqualified concession of liability renders it both impermissible and opportunistic for it now to attempt to introduce the appellant's alleged contributory negligence in order to seek a reduction in the extent of its liability....'

[20] In *Road Accident Fund v Krawa*¹¹ a Full Bench decision, Van Zyl J (as he then was) at paragraph 41 stated the following:

'[41] By way of an example, in a claim for damages for personal injury, where damage or loss is claimed under the head past medical expenses, is entitled to recover compensation in respect of such expenses which have been reasonable incurred by him or her and are fairly attributable to the bodily injuries sustained in the accident. Whether or not the expenses were in fact incurred, thereby reducing the economic value of the plaintiff's estate rendering him or her poorer, is to be established first before the amount to be awarded as compensation is calculated.'

[21] In this case, it is not in issue that the expenses for past medical and hospital expenses were incurred. The amount to be awarded as compensation in that regard is actually admitted by the defendant. There is accordingly no basis for me to support the contention by the defendant where it disclaims its liability to compensate the plaintiff for past medical expenses where the medical aid paid for such expenses. In **Discovery Health (Pty) Ltd v Road Accident Fund and Another , Case No. 2022/ 016179, Mbongwe J** at para [21] relying on the *Zysset and Others v Santam Ltd 1996(1)SA273 (C)* at 277 H – 279 C , stated:

“ In terms of our law , benefits received by a claimant from the benevolence of a third party or a private insurance policy are not considered for purposes of determining the quantum of a claimant's damages against the first respondent. The reason for this is merely because a benefit that accrues or is received from a private

¹¹ 2012 (2) SA 346 at page 346.

insurance policy origin from a contract between the insured and the insurance company for the explicit benefit of the claimant and its receipt does not exonerate the first respondent from liability to discharge its obligations in terms of the RAF Act.

[22] It appears to me that by insisting that it must be the plaintiff who must have paid for past medical and hospital expenses, the defendant expects a minor child to be able to produce proof that she actually incurred those costs. Were that to be expected of child claimants, it would certainly place a heavy financial burden on claimants.

[23] Here is another issue, the defendant by raising the issue places before this court indirectly an agreement between GEMS and plaintiff's mother and also that which exists between the plaintiff and GEMS, when it is not privy to it.

[24] I am of the view that, in determining whether or not the expenses were in fact incurred, thereby reducing the economic value of the plaintiff's estate rendering him or her poorer, cannot be viewed with a jaundiced eye, because to do so, would be to generalize claims for past medical expenses and thus miss the unique circumstances pertaining to each plaintiff in each case.

[25] In the circumstances, the plaintiff has succeeded in proving that she incurred the past medical expenses as claimed. I accordingly find that the defendant is liable to compensate the plaintiff for the past medical expenses.

ORDER

[26] I accordingly grant judgment in favour of the Plaintiff as follows:

26.1 Defendant is ordered to pay to the Plaintiff the agreed sum of R182 518.73. in respect of Plaintiff's claim for past medical and hospital expenses.

26.2 Payment of the aforesaid amount in paragraph 1 above shall be made directly to plaintiff's attorney of record, Labuschagne van der Walt Inc., trust account, details of which are as follows:

Account Holder: Labuschagne van de Walt Inc.

Bank: Absa

Branch Code: 6[...]

Account Number: 4[...]

Reference: V[...]

26.3 The defendant shall pay interest of the aforesaid amount in paragraph 1 above at the prevailing prescribed interest rate calculated from a date 14 days after the granting of this Order, in accordance with Section 17(3)(a) of the Road Accident Fund Act, Act 56 of 1996, as amended.

26.4 Defendant shall pay plaintiff's costs of suit, in respect of plaintiff's claim for past medical and hospital expenses up to and including 31 January 2023, as taxed or agreed, such costs are to include:

26.5 The costs of consultations between plaintiff's counsel, plaintiff's attorney, plaintiff and witnesses in preparation for the trial on the issue of past medical and hospital expenses.

26.6 The costs of attendances at case management and Roll Call proceedings as well as the costs of trial preparation checklists, in respect of plaintiff's claim, for past medical and hospital expenses.

26.7 The costs in respect of the previous orders of Court which were costs in the cause in respect of the issue of past medical and hospital expenses.

26.8 The costs of bundles and copies in respect of plaintiff's claim for past medical and hospital expenses.

26.9 The travelling costs of air tickets and the accommodation costs and expenses, if any, incurred by or on behalf of plaintiff in respect of the attendances at trial in respect of plaintiff for the hearing of the issue of past medical and hospital expenses for 31 January 2023.

26.10 The costs of the trial for 31 January 2023.

26.11 The costs of plaintiff's Counsel.

26.12 Declaring Mrs Esme van der Westhuizen a necessary witness.

26.13 Defendant is directed to pay interest on plaintiff's said taxed or agreed costs at the prevailing prescribed interest rate per annum calculated from a date 14 days after *allocator* or written agreement to date of payment.'

T.V. NORMAN
JUDGE OF THE HIGH COURT

APPEARANCES:

For the PLAINTIFF: **ADV FROST**
 Instructed by: **KITCHINGS INC**
 48 Canon Street
 UITENHAGE
 REF: AVS Kitching/sc/MAT15020

For the DEFENDANT: **MS PHILLIPS**
 ROAD ACCIDENT FUND
 4th Floor, Metropolitan Life Building
 Corner Druly Lane & Caxton Street
 EAST LONDON

Link Number: **4058651**
Claim Number: **505/12485846/1003/0**

Heard on : **31 January 2023**

Delivered on: 01 February 2023