

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 36071/19

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 18 March 2024

SIGNATURE

In the matter between

E.C C[...] OBO J. V[...]

Plaintiff

and

MEC FOR EDUCATION, GAUTENG PROVINCE

Defendant

JUDGMENT

COWEN J

1. The plaintiff instituted an action on behalf of her minor child for damages against the defendant, the Member of the Executive Council for the Department of Education, Gauteng (the MEC). The damages claimed arose from an incident which occurred at the child's school, the B[...] Primary School (the school) and which led ultimately to the amputation of the child's left big toe. The child was only seven years old at the time of the injury. The dispute was ultimately settled

by way of a payment made by the school's insurer, but the insurer refused to pay the litigation costs, which were ultimately reserved.

2. The costs dispute came before me on the trial roll on 13 March 2024. In order to facilitate the determination of the dispute, both parties delivered affidavits setting out their contentions and related facts. The defendant also delivered brief heads of argument. I heard oral argument from both parties' counsel.
3. The plaintiff submits that she is entitled to the costs of suit, on an attorney and client scale, effectively on the principle that costs should follow the result and the claim was successful. The defendant submits that each party should pay their own costs because the litigation was wholly unnecessary and would have been avoided had the plaintiff furthered the claim against the insurer prior to the commencement of the litigation. The defendant also contended that the settlement did not entail any concession on the merits.
4. The incident occurred on 12 October 2015. Shortly thereafter, and on 21 October 2015, the school lodged a claim under its insurance policy with its insurer and notified the plaintiff's then attorney that it had done so, supplying the claim number. The e-mail dated 28 October 2015 read: '*A public liability claim with Santam was lodged with claim number 1[...], regarding [the minor child].*'
5. It appears that shortly thereafter, the plaintiff's family left South Africa and emigrated to the United States of America and there was no further contact between the school and the plaintiff regarding the claim. On 8 January 2016, some three months after the incident, the plaintiffs' attorneys sent the defendant a notice of intention to institute legal proceedings in terms of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. It appears that nothing further happened until the action was then instituted some three years later on 22 May 2019.
6. The Court's attention was drawn to the provisions of section 59(1) and 60 of the Schools Act 84 of 1996 (the Schools Act) which provide:

'59. *Duty of schools to provide information*

(1) *A school must make information available for inspection by any person, insofar as such information is required for the exercise and protection of such person's rights.*

(2) ...

60. *Liability of State*

(1) (a) *Subject to paragraph (b), the State is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such public school would have been liable but for the provisions of this section.*

(b) *Where a public school has taken out insurance and the school activity is an eventuality covered by the insurance policy, the liability of the State is limited to the extent that the damage or loss has not been compensated in terms of the policy.*

(2) *The provisions of the State Liability Act [20 of 1957] apply to any claim under subsection (1).*

(3) *Any claim for damage or loss contemplated in subsection (1) must be instituted against the Member of the Executive Council concerned.*

(4) ...'

7. The Court's attention was also drawn to the provisions of the Regulations for Safety Measures at Public Schools¹ (the Regulations), specifically Regulation 8A(2) and (4) which provide:

'8A(2) A public school must take measures to ensure the safety of learners during any school activity, including –

(a) Insuring against accidents, injuries, general medical expenses, hospitalisation, and theft that may occur, depending on the availability of funds.

(b)...

...

8A(4) If an insurer is liable in the event of injury suffered by a learner, the school must assist the parent in claiming from the insurer on behalf of the learner.'

8. The first issue is whether the plaintiff achieved substantial success in the matter. In this regard the defendant submitted that the plaintiff did not as there was no concession of liability and acceptance of liability under the policy is not tantamount to liability under delict. In my view, this argument cannot succeed in circumstances where the insurer expressly consented to the concession of liability on the basis that the insurer accepted that the incident described in the particulars of claim was caused by the sole negligence of the school's employees. This was in correspondence dated 2 March 2021.
9. In these circumstances, costs would ordinarily follow the result. However, the defendant submitted that the litigation was wholly unnecessary, without any compulsion, and litigation costs unnecessarily incurred. In these circumstances,

¹ Promulgated under Government Notice 1040 (GG 22754) of 12 October 2001, as amended by GN R1128 in GG29376 of 10 November 2006.

it was submitted that costs should not be awarded against the defendant.² The argument was advanced on both a factual and a legal premise, which are interlinked.

10. The factual premise of the argument – as advanced on affidavit and in the heads of argument – was that the plaintiff was at all material times aware that her claim for compensation had been lodged with Santam. However, it was submitted, the plaintiff adopted a lackadaisical approach to prosecuting and finalising the insurance claim. The plaintiff migrated and at no stage asked for any assistance from the school in prosecuting the insurance claim, which is regarded, on affidavit, to be the plaintiff's insurance claim. In my view this approach to the facts is flawed, because of its legal premise, which is that the insurance claim is the plaintiff's to pursue. It is not. The insurance contract is concluded between the school and the insurer, and the claim itself was submitted by the school as the claimant. There is nothing in the contract itself or on the facts that could yield the conclusion that any third party contract (or *stipulatio alteri*) was concluded. It was always the duty of the school to pursue the claim. Indeed, there was no communication from the school to the plaintiff's attorneys suggesting otherwise. The plaintiff's attorneys were merely informed that the claim had been lodged.
11. During argument, however, I queried why the plaintiff had at no time followed up with the school about the claim. The plaintiff was represented, was aware that the insurance claim had been submitted and at least ought to have known that compensation might be forthcoming from the insurer. Had the plaintiff made simple enquiries with the school, before pursuing litigation, it is likely that the matter would have become settled at an earlier stage.
12. However, this on its own can only serve to limit the extent of any costs award in the plaintiff's favour, as it was ultimately the responsibility of the school to prosecute the insurance claim. In arriving at this conclusion, I have considered the import of Regulation 8A(4) and sections 59 and 60 of the Schools Act. The

² Relying on *Chetty v Louis Joss Motors* 1948(3) SA 329 (T) at 333; *Fletcher & Co v Le Sueur* (1 CTR 2013); *Bester v Van Niekerk* 1960(2) SA 363 (ECD), AC Cilliers Law of Costs, para 3.12 & 3.13 issue 32; *Fleming v Johnson & Richardson* 1903 TS 319 at 325.

Supreme Court of Appeal has interpreted section 60, specifically section 60(1) read with section 60(3) to place liability on the MEC, not the school, at least where a claim falls within the ambit of section 60.³ Furthermore, there is no contractual relationship in this case between the plaintiff and the insurer. Regulation 8A(4), in my view, does not alter the contractual position between the insurer and the school. What it does is impose a duty on the school to assist the parent by claiming under the relevant insurance policy.

13. The legal premise of the argument, however went further. In short, it was contended that the effect of section 60(1)(b) was to confer a right on a plaintiff to pursue a claim against an insurer. I disagree. The purpose of section 60(1)(b) is to limit the liability of the State to compensation that it cannot obtain from the insurer. It does not alter the common law contractual relationship between insurer and insured. That interpretation is consistent with the Supreme Court of Appeal's decision in *Emeran*.⁴ Section 60(4) makes it clear that any claim is against the MEC. Had the legislature intended to create some sort of statutory third party benefit it would have said so expressly and the presumption that the legislature is presumed to have Section 60(4) makes it clear that the claim is against the MEC. Had the legislature intended to create a statutory third party benefit it would have said so expressly.

14. I am however satisfied that a portion of the plaintiff's costs should not be recoverable as it is difficult to understand why the plaintiff, after migrating to the United States made no contact with the school to follow up on the insurance claim. However, that conduct does not account significantly for what ensued. First, the school itself appears to have done nothing. Secondly, after receiving the notice, the defendant did nothing to ascertain whether an insurance claim had been lodged thereby protecting it under section 60(1)(b). Had either the school or the defendant pursued the matter as they ought to have, the litigation would have been avoided.

³ *Parktown High School v Emeran* 2019(4) SA 188 (SCA) (*Emeran*) at paras 7 and 18 to 21.

⁴ *Id.*

15. However, that is not the end of the matter because, as submitted on behalf of the plaintiff, what ensued after the litigation commenced in 2019 is also relevant to costs. More specifically, the evidence demonstrates that Santam only became actively involved shortly before the trial was due to commence and once it became involved, the matter was swiftly settled. That was in 2021. The question thus arises why it took so long before the matter was settled, during which time extensive litigation costs were incurred, not least in respect of expert reports.

16. The defendant submits that the plaintiff was at fault because it failed to join Santam to the proceedings, an issue raised in a special plea, which was ultimately not determined. Had the plaintiff done so, it was submitted, the matter would have been swiftly resolved. The plaintiff disputes any obligation to join the insurer, contending that should the defendant claim any indemnity for costs it was incumbent upon it to join Santam and pursue its claim. On this issue, and in accordance with my findings in paragraph 13, I agree with the plaintiff. Moreover, the plaintiff submits that when regard is had to the defendant's plea, the defendant not only joined issue with the plaintiff, but raised substantive defences imputing responsibility for the amputation on medical negligence of the doctors. That in turn had an impact on the incurrence of costs for the plaintiffs. The point is well made.

17. In all of the circumstances, I am of the view that the plaintiff is entitled to 90% of her costs on a party and party scale. The request for attorney and client costs was not persisted with in argument, and a draft order was supplied without reference to such an order, but it was not abandoned, I have considered the request and have concluded there is no basis for such an award.⁵

18. The following order is made:

18.1. It is recorded that the issue of liability and quantum have been settled between the parties and the quantum has been paid to the Plaintiff.

⁵ *Public Protector v South African Reserve Bank* [2019] ZACC 29

18.2. The Defendant shall pay 90% of the plaintiff's taxed or agreed party and party costs for the action on the High Court scale (subject to the discretion of the taxing master), which costs may include, but not be limited to:

18.2.1. The trial costs for 8 March 2021 (the matter was removed by the roll by agreement with costs in the cause).

18.2.2. The trial costs pertaining to 13 March 2024.

18.2.3. The costs of senior-junior counsel which will include reasonable preparation and trial costs (including drafting of affidavit regarding the costs aspect).

18.2.4. The reasonable costs of obtaining the medico-legal reports which were furnished to the defendant.

18.3. In the event that the costs are not agreed:

18.3.1. The plaintiff shall serve a notice of taxation on the defendant's attorneys on record.

18.3.2. The plaintiff shall allow the defendant 30 (thirty) days from date of *allocatur* to make payment of the taxed costs.

18.3.3. Should payment not be affected timeously, the plaintiff will be entitled to recover interest at the relevant prescribed rate *per annum* on the taxed or agreed costs from date of *allocatur* to date of final payment.

18.4. The amounts referred to above will be paid to the Plaintiff's attorneys, **Werner Boshoff Incorporated**, by direct transfer into their trust account, the details of which are as follows:

Account holder: **WERNER BOSHOFF INC TRUST ACCOUNT**

Bank: Standard Bank, Lynnwood Ridge
Branch Code: 0[...]
Account no: 0[...]
Reference: REF: W[...] B[...]

S J COWEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 18 March 2024.

Date of hearing: 13 March 2024

Date of judgment: 18 March 2024

Appearances:

On behalf of Plaintiff: Adv. C.R van Onselen instructed by Werner Boshoff
Inc

On behalf of Defendant: Adv. K Toma instructed by State Attorney