

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:768/2013

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

12/7/2018

DATE

SIGNATURE

In the matter between:

SELFMED MEDICAL SCHEME

PLAINTIFF

and

LANGEVELDT & NEL ATTORNEYS INC
MARINA MONS N.O.

FIRST DEFENDANT
SECOND DEFENDANT

JUDGMENT

RANCHOD J:

[1] The plaintiff, a medical aid scheme, claims as against the first defendant damages of R1 772 014.62 arising from its alleged professional negligence as attorneys in not prosecuting a claim for recovery of past hospital, medical and related expenses against the Road Accident Fund,

arising from the death of the second defendant's husband and as a result the claim prescribed.

[2] In the alternative, the plaintiff claims the damages from the second defendant in her capacity as executrix in the estate of her late husband, who was a member of the plaintiff and on whose behalf the plaintiff alleges it disbursed the hospital, medical and other expenses.

[3] It is common cause between the parties that the second defendant's late husband, Christiaan Anton Mons (the deceased) was involved in a motor vehicle collision on 1 September 2006 because of which he died on 10 February 2007. The deceased was the driver of one (with registration letters and numbers DDR 970 MP) of the three motor vehicles involved in the collision.

[4] Plaintiff alleges that the accident was caused by the sole negligence of a De Neycker who was the driver of a motor vehicle with registration letters and numbers MKZ 583 GP.

[5] It is also common cause or not in dispute that-

- the deceased was at all relevant times and in particular during the period 1 September 2006 to 10 February 2007 a member of the plaintiff medical aid scheme.

[6] During the period between the date of the accident and the date of death of the deceased, hospital, medical and other expenses were incurred by him or on his behalf. (For the sake of convenience, I will refer to all these expenses as 'the medical expenses' and to the second defendant as 'the executrix'). The plaintiff says it paid most of the medical expenses on behalf of the deceased. As the deceased was its member and beneficiary, he was entitled to payment by the plaintiff of the medical expenses he incurred. However, in terms of Act No 56 of 1996 (the Act) the Road Accident Fund (the RAF) is liable to pay damages (including, *inter alia*, medical expenses) for personal injuries sustained by a claimant because of the negligent driving of the driver (the insured driver) of a motor vehicle.

[7] The second defendant instructed the first defendant in August 2007 to lodge claims for personal injury and for loss of support on behalf of herself and her minor children against the RAF due to the death of the deceased in the motor vehicle collision on 1 September 2006. The first defendant duly did so, and the claims were settled by the RAF in March 2010.

[8] The plaintiff says that as a member of the plaintiff medical scheme the deceased was bound by its rules. Its case is that in terms of rule 17 of the scheme the deceased, and after his death the executrix of his estate, were obliged to pursue the claim against the RAF and reimburse the plaintiff those amounts which it had paid on behalf of the deceased that may be recovered from the RAF. Rule 17 provides as follows:-

. '17. **Costs recoverable from other parties**

- 17.1 Costs incurred by a Beneficiary for which another party may be legally responsible, including a Service Provider, do not qualify for Benefits – unless the Scheme is satisfied that it is unlikely that the Beneficiary will receive sufficient compensation from the other party, or recover it in terms of legislation covering that situation.
- 17.2 However, The Scheme may in its discretion advance amounts to, or for the benefit of, the Beneficiary to the extent that they do not exceed Benefits which normally would have been payable.
- 17.3 The Member must inform the Scheme in the manner, and within the period, applicable to qualifying claims of the possible claim and the costs involved. The Beneficiary must lodge a claim against the relevant party for the relevant costs within the prescribed period and in the prescribed manner - and keep the Scheme informed of developments.
- 17.4 If the Beneficiary does not prosecute the claim to the satisfaction of the Scheme, the Beneficiary must cede the claim to the Scheme at its request - and thereafter provide such assistance as may be reasonably expected by the Scheme.
- 17.5 The Beneficiary must repay from the compensation received from such other party, the advanced amounts to the Scheme. Any deficit between the amounts advanced by the Scheme and that repaid to the Scheme must be paid to the Scheme by the Member upon request.'

[9] Alexander Forbes Accident Compensation Technologies (Pty) Ltd (Alexander Forbes), as its agent, represented the plaintiff in its dealings with the defendants. Alexander Forbes had instructed the first defendant to contact the executrix and lodge a claim for the medical expenses with the RAF.

[10] The Plaintiff says Alexander Forbes found out on or about 16 April 2010 that the first defendant had settled the personal injury and loss of support claims of the executrix in her personal capacity and of her minor children with the RAF and that no claim was instituted for the medical expenses incurred by the deceased and which were paid for by the plaintiff.

[11] As I said, the plaintiff's claim against the executrix is in the alternative to that against the first defendant. The basis for the alternative claim is that

as executrix of the deceased estate second defendant was under a duty to institute action for the medical expenses paid by the plaintiff but, in breach of her duty, failed to do so. Alternatively, she failed to cede the claim to the plaintiff, to enable it to pursue its claim independently, despite demand by the plaintiff.

[12] The defendants deny having been instructed by the plaintiff to lodge any claim against the RAF for the medical expenses or that they were obliged to do so and also raised several other defences. They deny that the deceased's estate would have been entitled to recover the medical expenses from the RAF. It is averred that the plaintiff has not pleaded any facts to show that the RAF would have been legally responsible to pay all the deceased's medical expenses or any portion thereof nor the amount that would have been recoverable from the RAF. They also deny that the medical expenses were necessary expenses or were reasonably incurred or that they were reasonable amounts. The defendants also deny that the collision was caused solely by De Neycker, the driver of motor vehicle with registration MKZ 583 GP. They aver that the deceased was also negligent, which negligence contributed to the collision. The claim would therefore have been subject to apportionment in terms of the Apportionment of Damages Act No. 34 of 1956. The defendants also aver that the executrix of the estate was not bound by the rules of the plaintiff's medical aid scheme. Even if she was, on a proper interpretation of rule 17 there was no obligation on her to claim from the RAF particularly because plaintiff alleges in its particulars of claim¹ that the

¹ Para 5.1 of the particulars of claim

deceased, as a beneficiary, was entitled to the payment of medical expenses on his behalf by the plaintiff. Accordingly, the plaintiff has not disclosed any cause of action that the executrix had any duty to claim any amount from the RAF and repay it to the plaintiff. Finally, the executrix denies that she was ever requested to cede any claim to the plaintiff.

[13] The second defendant also raised a special plea of prescription. She pleaded that in accordance with rule 17 of plaintiff's rules the medical expenses for which the RAF was legally liable were not medical benefits to which the deceased was legally entitled. The medical expenses were paid by the plaintiff in the exercise of its discretion in terms of rule 17. It was in fact a loan to the deceased and was therefore claimable from the deceased's estate within a period of three years from his date of death on 10 February 2007. More than three years had elapsed when summons was issued in the present action for recovery of the loan hence the claim has prescribed.

[14] The plaintiff replicated to the special plea. It said it obtained knowledge of the first defendant's failure, alternatively the executrix's failure to recover the medical costs from the RAF only after the loss of support claims of the executrix and her children were finalised on or about 3 March 2010. Accordingly, says plaintiff, since summons was issued in this matter on 15 January 2013 the claim has not prescribed.

[15] In what follows it will become apparent that the plaintiff had been led to believe by attorney LC Nel of the first defendant that he had in fact lodged a

claim with the RAF for the medical expenses and that he was ready to issue summons to pursue the claim further. Thereafter, he informed Mr Harry Nel, an accountant who had apparently assisted the second defendant to wind up the deceased's estate that pleadings in the matter had closed and he was awaiting a trial date. It appears from the evidence that the loss of support claims were finalised in March 2010 and that it was in fact at that time that Alexander Forbes became aware that the claim for medical expenses of the deceased had not been lodged. Accordingly, the special plea of prescription of the claim should in the normal course fail.

[16] However, from the evidence it is clear that Alexander Forbes was aware that it was the executrix who had to instruct the first defendant to lodge a claim with the RAF on behalf of the deceased estate. That is why it told Mr L C Nel that he should obtain instructions from the executrix to do so. In a letter² dated 26 June 2008 addressed to the first defendant Ms Monice Roodt of Alexander Forbes wrote—

'Dear Sir

THIRD PARTY CLAIM: EXECUTOR OBO CA MONS: 49027732

Your reference is L C Nel/GN/1313/M77.

With reference to our telephonic conversation earlier today, it is confirmed that you will make contact with the executor of the estate *and proceed with a claim obo the executor* against the RAF. [My emphasis.]

The executor of the estate is Mr Harry Nel, contact number (017) 712 1301.

We also confirm that our client, Selfmed Medical Scheme, will be responsible for the legal fees in recovering the medical expenses from the RAF. They

² Annexure "C" to the particulars of claim.

however requested that the fees be recovered from the proceeds received from the RAF. Once the matter has been finalised, you are requested to provide us with a bill of costs.

Attached hereto the most recent schedule, listing all the accounts paid by the scheme. We are also in possession of most of the accounts, and will provide them to you on request.'

The letter is signed by Ms Monice Roodt who testified during the trial and confirmed the contents of the various letters and emails she wrote to the first defendant and its correspondent in Pretoria as well as to the plaintiff.

[17] In a file note dated 'September 2008' which was discovered by the first defendant and referred to in evidence during the trial when Ms Roodt confirmed the correctness of the note the author (apparently a staff member of the first defendant) made, *viz-*

'I received a call from Monice of Alexander Forbes.

She wanted to know if we have filed a claim with the RAF, *using the Executor of the deceased.*

She says she has sent us a letter but have had no response from us.

Her phone nr is' (My italics.)

[18] On 9 September 2008 LC Nel wrote to Alexander Forbes and said-

'RE: C A MONS // THIRD PARTY CLAIM

We have now completed our investigation into the accident in which Mr Mons was killed.

We acted on behalf of the wife of the late Mr Mons whose child also injured (*sic*) during the accident.'

[19] On 30 September 2008 LC Nel again wrote to Alexander Forbes and said-

'RE: C A MONS // THIRD PARTY CLAIM

We refer to the above-mentioned *instruction*.

We are ready to proceed with a Summons in the matter against the RAF.

Our attorneys in Pretoria however insist that we work on a contingency basis.

The normal fee structure is that they will retain 30% of all the monies that they recover on behalf of Alexander Forbes.

Should the firm be unsuccessful they will not charge any fees.

Kindly confirm that this arrangement is in order so that we can proceed.' (My italics.)

[20] Alexander Forbes responded in a letter dated 6 November 2008 that first defendant share the contingency fee with itself equally as plaintiff was only prepared to pay an all-inclusive contingency fee of 30% on the basis that it includes Alexander Forbes' fees. Monice Roodt wrote-

'We are of the opinion that, as we have already quantified the claim and obtained copies of the necessary accounts for submission to the RAF, you should consider sharing the proposed contingency fee of 30% with Alexander Forbes.

We would propose that you retain 15% and we retain 15% for our services rendered.

We await your response as a matter of urgency, to avoid any further delays in this matter.'

[21] The first defendant did not revert to Alexander Forbes about this proposal.

[22] It is apparent that in the letter of 26 June 2008 Mrs Roodt tells the first defendant to contact the 'executor' - not that the plaintiff is acting on behalf of

the executrix of the deceased estate. In this regard Mrs Roodt, who represented Alexander Forbes conceded whilst testifying under cross-examination that no agreement was concluded between either the plaintiff or Alexander Forbes and the first defendant. She also conceded that she did not appoint Mr L C Nel or the first defendant on behalf of the plaintiff.

[23] On 20 April 2009 Harry Nel of Chartered Accountants Nel, Prenzler & Potgieter wrote to the first defendant (marked for the attention of Mr LC Nel) – 'BOEDEL WYLE C A MONS

Ons verneem graag van u hoe ver die derdeparty eis in bogenoemde boedel gevorder het.' (Loosely translated: 'ESTATE LATE C A MONS. We enquire from you how far the third party claim in the abovementioned estate has proceeded.')

[24] Mr LC Nel replied on 11 May 2009-

'RE : BOEDEL WYLE C A MONS

Die Pleitstukke in bovermelde saak is gesluit.

Ons het aansoek gedoen vir 'n verhoor datum.

. . . .' ('The pleadings in the abovementioned matter are closed. We have applied for a trial date.')

[25] Mr Harry Nel assisted the executrix in the administration of the estate and no doubt for this reason enquired from L C Nel about progress of the claim for the medical expenses.

[26] It is clear from the correspondence between both Alexander Forbes and Mr Harry Nel and the first defendant that Mr LC Nel gave the distinct

impression that he had lodged a claim for the medical expenses, thereafter had issued summons and that pleadings had closed and he was awaiting a trial date. This implies that he had obtained the necessary mandate from the executrix to pursue the claim for the medical expenses.

[27] The question that arises is whether the executrix had in fact instructed the first defendant to pursue the claim for medical expenses. Mrs Mons testified at the behest of the plaintiff after she was made available by the defendants although she has been cited as the second defendant in her capacity as the executrix of her husband's estate. She testified under cross-examination that she did not claim for her late husband's medical expenses but only for herself and her children. She also said she had no contact with the plaintiff after the accident. No one asked her to claim for the medical expenses paid by the plaintiff and she did not even know that she could do so. As far as Mrs Mons was concerned, the plaintiff paid the expenses and that was it. No one had told her that she should cede the claim to the plaintiff. She testified that the estate has already been wound up.

[28] There is nothing to gainsay Mrs Mons' evidence. The plaintiff dealt with the first defendant without a clear mandate from the executrix to do so. Furthermore, an attorney cannot institute an action without a mandate from the proper plaintiff, i.e. the executrix *in casu*. The fact that the plaintiff undertook to pay the first defendant's fees does not take the matter further insofar as its claim against it is concerned.

[29] It is possible (I put it no higher than that) that the first defendant did obtain instructions from either Mrs Mons as executrix or from her agent Mr Harry Nel, else why would Mr L C Nel say he had instituted action and was awaiting a trial date unless he was being untruthful. But then it is the executrix who may have a claim against the first defendant for not carrying out her instructions or letting the claim prescribe. There is no nexus between the plaintiff and the first defendant and the claim against the first defendant must accordingly fail.

[30] In my view, the plaintiff should have submitted a claim against the deceased estate. It did not do so. The estate has been wound up and more than three years elapsed from the date of death of the deceased when it instituted the present claim against the second defendant. It does not avail the plaintiff to say it only became aware that first defendant did not lodge a claim when the loss of support claims were finalised in March 2010 and that the three year prescription period began to run from that date hence the issuing of summons in January 2013 interrupted the running of prescription. It was aware, by its own admission, with reference to Rule 17 of its rules that the deceased estate was liable to it for the expenses it paid on its behalf.

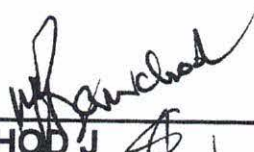
[31] Mr Becker, the principal officer of the plaintiff, conceded under cross-examination that he did not have any knowledge of the events which occurred long before his appointment in September 2014. However, he was in a position to explain the plaintiff's rules and to interpret them. He readily conceded that there was no obligation, in Rule 17.3 or anywhere else, on the

executrix to institute action against the RAF. In my view, the concession was properly made. As I said, the proper course would have been for the plaintiff to submit a claim against the estate.

[32] The plaintiff also alleged that it had demanded cession of the claim from the executrix but she had failed to do so 'despite demand'. During her testimony, the executrix denied having been asked to cede the claim to the plaintiff. No evidence was led by the plaintiff as to the manner in which and when the demand was made. The claim against the second defendant on that basis must therefore also fail.

[33] In light of the conclusions I have come to it is not necessary for me to deal with the other defences raised by the defendants.

[34] The plaintiff's claim against both defendants is dismissed with costs.



RANCHOO J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff	: Adv. J.F Grobler
Instructed by	: FJ Jordaan Inc.
Counsel on behalf of Defendant	: Adv. F.H Terblanche (SC)
Instructed by	: Savage Jooste & Adams
Date heard	: 1 June 2017
Date delivered	: 12 February 2018