IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no:1284/2012

In the matter between

MARYKA BEZUIDENHOUT **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

Coram: Mgudlwa AJ

Heard: 27 MARCH 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be at 15h00 on 01 August 2024.

Summary: Claim for damages arising from a motor collision, in respect of the past medical expenses against Road Accident Fund – The issue is whether the Road Accident is liable notwithstanding the fact that the past medical expenses had been settled by the Medical Aid – application of *res inter alios acta* principle.

ORDER

1. The defendant shall pay the Plaintiff a sum of R86 092.75 for the past hospital and medical expenses, together with the interest thereon at the prescribed legal rate of interest calculated from 14 days after date of this order to date of final payment; and
2. The Defendant shall pay the Plaintiff's costs on the scale as between attorney and client and including the costs of counsel on scale B of rule 67A of the Uniform Rules.

JUDGMENT

Mgudlwa AJ:

INTRODUCTION

[1] On 27 March 2024, I granted an order in the following terms:

'1. The Defendant is 100% liable for the Plaintiff's proven or agreed damages.

2. The Defendant shall pay to the Plaintiff's attorney of record by means of electronic transfer of funds, a capital amount of R1 737 654.75(One Million Seven Hundred and Thirty-Seven Thousand Six Hundred and Fifty Rand and Seventy-Five Cent) which amount is in respect of past and future loss of earnings/ earning capacity.

3. Payment will be made within 30 days to the trust account of the Plaintiff's attorney of record within 180 (One Hundred and Eighty) days from the day of this order.

4. Interest a tempore-morae shall be calculated in accordance with the Prescribed

Rate of Interest Act 55 of 1975, read with section 17 (3)(a) of the Road Accident Fund Act 56 of 1996 (the RAF Act), 180 (One Hundred and Eighty) days from the date of this order.

5. The Defendant is to pay the Plaintiff's agreed or taxed (subject to the discretion of the Taxing Master) High Court costs as between party and party up and until 27 March 2024, such costs to include costs of counsel and the reasonable qualifying fees of the following experts:

5.1 Dr LF Oelofse (Orthopaedic Surgeon)

5.2 C van Niekerk (Industrial Psychologist)

5.3 G J Mellet (Actuary from Argen Acturial Solutions)

5.4 Narishca Doorasamy (occupational Therapist) and cost of the joint minute between her and Adeliade Phashe

6. The party and party costs, as agreed or taxed, shall be paid by the Defendant directly into the trust account of Rosendorff, Reitz Barry Attorneys for the benefit of the Plaintiff and payment shall be made within 180 (One Hundred and Eighty) days from the date of the allocator.'

[2] What remains an issue for determination is the Plaintiff's claim for damages in respect of past and hospital expenses in the sum of R86092. 12 (Eighty-Six Thousand and Ninety-Two Rands and Twelve Cents). At the heart of the issue, the question is whether the Road Accident Fund (the Fund) is liable even though the expenses were settled by the medica aid scheme.

The Plaintiff's claim

[3] On 7 April 2007, the Plaintiff was a passenger in a motor vehicle that collided with an insured driver as contemplated in s 17(1) of the RAF Act. It is common cause that the Plaintiff sustained serious bodily injuries as a result of the collision. These injuries are set out in the particulars of claim as well as in the expert reports filed for the purpose of this action. It is not necessary to detail the injuries as parties settled the question of liability. It was agreed, first, that the Defendant was liable for 100% of the Plaintiff's proven damages and, second, that the plaintiff's injuries were serious as contemplated in s 17(1) read with s 17(1A) of the RAF Act in respect of claims for general damages ('non-pecuniary'

damages).

Arguments

Plaintiff

[4] With regard to this claim, Council for the Plaintiff, relied on a principle of *res inter alios acta* (a thing done, or transaction entered into, between certain parties cannot benefit or injure those who are not parties to the act or transaction) which is consistently applied by our courts in regard to hospital and medical expenses paid by insurance companies. He based his arguments on the caselaw which consistently stated that the 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 defendant.

Defendant

[5] Counsel for the Defendant, in pursuance of her arguments, handed in a letter dated 2 March 2023, where the Fund rejected the claim for past medical expenses of the plaintiff on the basis that the said expenses were paid by Spectramed medical aid scheme and that the claimant has not sustained any loss or incurred any expenses in respect of the past medical expenses claimed. In her heads of arguments, she emphatically argued that, in terms of the RAF Act, the Fund is to reimburse third parties who suffer a loss as a result of a motor vehicle action. According to her, a medical aid scheme is neither a third party, nor a supplier of services as contemplated by the RAF Act. Furthermore, a medical aid scheme has no right to reimbursement after honoring its statutory obligation arising out the Medical Schemes Act 131 of 1998.

Applicable Law

[6] Section 17 can be described as the heart of RAF Act as it is the provision which creates the obligation by the Fund to compensate persons involved in motor vehicle accidents. The provision reads as follows:

'17 – Liability of the Fund and Agents –

(1) the Fund or an Agent shall – (a) subject to this Act, in the case of a claim for compensation under this Section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established; (b) subject to any Regulation made under Section 26, in the case of a claim for compensation under this

Section arising from driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or the owner of the motor vehicle. . .'

[7] The courts have on many occasions held that medical aid schemes benefits are a form of indemnity insurance and should accordingly be disregarded for the purpose of an award for damages, in accordance with the principle of *res inter alios acta.* In *Zysset and Others v Santam Limited*[1] the court made the following explanation:

'[I]t is well established in our law that certain benefits which a plaintiff may receive are to be left out of account as being completely collateral. The classic example are (a) benefits received by the plaintiff under ordinary contracts of insurance for which he has paid premiums and, (b) moneys and other benefits received by the plaintiff from the benevolence of the third parties motivated by sympathy. It is said that the law baulks at allowing the wrongdoer to benefit from a third party's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff.'[2]

[8] In the sphere of Road Accident Fund litigation, the principle of *res inter alios acta* has been consistently upheld. In *Mooideen v Road Accident Fund*,[3] the court after setting out the relevant legal basis, held that '... the settlement by Discovery of the deceased past medical expenses, did not relieve the Defendant of any of its legal obligation to compensate the Plaintiff in her representative capacity for the past medical expenses which the deceased incurred. Discovery's payment of these expenses was, therefore, an irrelevant collateral transaction with respect of the Defendant when dealing with a claim by the deceased estate against the Defendant. The Defendant is not entitled to raise Discovery' medical aid scheme indemnification as a defence and therefore benefit from the payment." This court proceeded to say, that, "the recovery made by the deceased estate is a matter between the Plaintiff and Discovery and has, therefore raised *res inter alios acta*.'

[1] *Zysset and Others v Santam Limited* 1996 (1) SA 273 (C).
[2] Ibid at 278C-D.
[3] Unreported judgment under case number 17737/2015, delivered on 11 December 2020.

[9] I deem it apposite to mention that there has been a consistent legal position adumbrated by the courts regarding the Road Accident Fund's liability to the victims for the payment of the past medical expenses where the settlement was made by the medical aid scheme. On 12 August 2022, the Defendant issued an 'internal Communique' distributed by the Acting Chief Claims Officer to all Regional managers, instructing them to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses. Discovery Health was one of the medical aid schemes on the list. It launched an urgent application in the North Gauteng High Court, Pretoria,[4] for *inter alia* an order reviewing and setting aside that communique ('directive'), contending that it was unlawful and inconsistent with s 17 of the RAF Act, which imposes an obligation on the RAF to pay a claimant's proven damages including past medical expenses.

[10] In his judgment, Mbongwe J found the directive to be unlawful and inconsistent with the provisions of s 17 of RAF Act. Consequently, it was set aside on that basis. At para 16 of the judgment, he emphasized the purpose of the RAF Act and similar legislation preceding as aptly described in *Engelbrecht v Road Accident Fund & Another*[5], as primarily to give the maximum protection to persons who suffer loss or damages as a result of the negligent driving or unlawful conduct in the driving of a motor vehicle by the driver thereof. Most importantly, it was held that the RAF Act does not provide for the exclusion of benefits the victim of a motor vehicle accident has received from a private medical scheme for past medical expenses.[6] The court reiterated the legal position that RAF is not entitled to seek to free itself of the obligation to pay full compensation to victims of motor vehicle accidents.[7] Consequently, the RAF applied for leave to appeal, firstly in the High Court[8] and secondly in the Supreme Court of Appeal (SCA)[9] and they were unsuccessful. The Constitutional Court[10] also confirmed the decision of refusing an application for leave to appeal by the High Court and SCA and refused the application with costs.

Conclusion

[4] Discovery Health (Pty) Limited v Road Accident Fund and Another (2022/016179) [2022] ZAGPPHC 768.
[5] [2007] (6) SA 96 (CC).
[6] Ibid para 27.
[7] Ibid para 29.
[8] On 23 January 23, High Court in Pretoria denied the RAF leave to appeal.
[9] On 31 March 2023, the SCA dismissed the RAF's application for leave to appeal
[10] On 18 October 2023, the Constitutional Court refuses the RAF's application for leave to appeal.

[11] In my view, on consideration of all the authorities set out above, as well as on a proper interpretation of s 17 of RAF Act, it is apparent that the Defendant's liability to a claim for past medical expenses is not affected by the fact that the Plaintiff's medical aid has already paid those expenses. It is clear from the decision referred to above, that the *res inter alios acta* principle does not permit the Defendant to deduct the amounts paid by Spectramed from the quantum payable to the Plaintiff in respect of past medical expenses. I interpose to mention that the counsel for the Defendant, in her legal arguments, was unable to refer this court to any court decision and or authority which supports rejection of a claim for past medical expenses by RAF.

Costs

[14] With regard to costs, I deem it necessary to mention that, notwithstanding the dismissal of the application for leave to appeal by the Constitutional Court, the RAF has nonetheless persisted in refusing to pay the Plaintiff her past medical expenses. In my view, this conduct deserves to be deprecated. It is clutching at straws and in the process depriving deserving claimants of their lawful entitlement. In the process, it is shamefully wasting yet more public funds which should be directed at settlement of worthy claims.[11] *In casu*, I do take note of the fact that counsel for the Defendant was acting on instructions of the letter dated 2 March 2023 from RAF litigation officer. In the circumstances I am persuaded that the punitive costs award sought on behalf of the Plaintiff is warranted.

Order

[15] The following order is made:

1. The defendant shall pay the Plaintiff a sum of R86 092.75 for the past hospital and medical expenses, together with the interest thereon at the prescribed legal rate of interest calculated from 14 days after date of this order to date of final payment; and
2. The Defendant shall pay the Plaintiff's costs on the scale as between attorney and client and including the costs of counsel on scale B of rule 67A of the Uniform Rules.

[11] *Van Tonder v Road Accident Fund* [2023] ZAWCHC 301.

S.T Mgudlwa , AJ

Appearances

For the Appellant:	Adv. H. van Vuuren
Instructed by:	Rosendorf Reitz Barry Attorneys Bloemfontein
For the Third to Fifth Respondents:	Ms. J Gouws State Attorney, Bloemfontein

[redacted]

S.T Mgudlwa , AJ

Appearances

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