IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 990/2022

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

In the matter between:

MARTHA ALLETTA VISSER Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

Heard on: 12 August 2024

Delivered on: 30 August 2024

Summary: Claim against Road Accident Fund. Bodily injuries. Past medical expenses. Whether benefits received from the private medical aid scheme are deductible from claim of past medical expenses. RAF's application for a postponement or removal of matter pending reconsideration of the RAF's application for leave to appeal in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 in *Van Tonder v Road Accident Fund* (1736/2020; 9773/2021) [2023] ZAWCHC 305 (1 December 2023) which was refused. Fund liable to pay.

ORDER

1. The defendant shall pay the plaintiff a capital amount of R2 032 980.77 in respect of plaintiff's claim for past medical and hospital expenses.

2. The capital amount is payable by means of direct transfer into the trust account of the plaintiff's attorney; Stefan Greyling Incorporated – Trust Account, First National Bank, Menlyn Maine, branch code: 2[...], account number: 6[...], reference V[...].

3. The plaintiff shall allow the defendant 180 (one hundred and eighty) calendar days to make payment of the capital amount calculated 14 (fourteen) days after date of this order, failing which the plaintiff will be entitled to recover interest at the prescribed rate of interest.

4. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include counsel's fees in respect of attending the trial proceedings on 12 August 2024 and preparation of the heads of argument.

5. The plaintiff shall, in the event that costs are not agreed, serve a notice of taxation on the defendant's attorney of record; and

6. The plaintiff shall allow the defendant 180 (one hundred and eighty) days to make payment of the taxed costs.

JUDGMENT

MAMOSEBO J

[1] On 5 October 2023 Stanton J granted an order by agreement to the tune of R4 950 739.95 in partial settlement of the plaintiff's action, calculated as follows: R2 850 000.00 in respect of General damages and R2 100 739.95 in respect of Loss of Earnings. The plaintiff's claim for past medical expenses

was separated from the other heads of damages in terms of Rule 33(4) of the Uniform Rules of Court and postponed *sine die.*

[2] This then makes the plaintiff's claim for the payment of past medical expenses, either paid by POLMED medical aid or incurred by the plaintiff or her husband personally, the only remaining issue that stands for determination on whether the Road Accident Fund (RAF) is liable in that regard or not.

[3] This matter was set down for hearing on 12 August 2024. At commencement of the trial, the State Attorney, Mr Mogano for the RAF, submitted that he did not receive any instructions to proceed with the hearing save to seek the court's indulgence for the hearing to be postponed or removed from the court roll pending the decision by the President of the Supreme Court of Appeal for reconsideration of the RAF's application for leave to appeal in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013.

[4] The context argued was that the application before me to postpone hearing this head of damages pertaining to the past medical expenses stems from the Western Cape Division's unreported judgment of *Van Tonder v Road Accident Fund* (1736/2020; 9773/2021) [2023] ZAWCHC 305 (1 December 2023) before Cloete J. There the RAF sought leave to appeal, which was dismissed with costs by Cloete J on 6 March 2024 on the basis that there are no prospects of success on appeal. RAF thereafter petitioned the SCA. On 13 June 2024 Makgoka JA and Masipa AJA dismissed the application for leave to appeal with costs on the grounds that there is no reasonable prospect of success in the appeal and no compelling reason why the appeal should be heard.

[5] In the present matter the following have informed my decision to proceed with the hearing of this matter. The trial court and the SCA have already dismissed the RAF's application for leave to appeal for lack of prospects of success and no compelling reasons for the appeal to be heard. The RAF has ignored the principle that postponements are an indulgence granted by the

courts following a substantive application. To assume that pending the application for reconsideration will entitle it to a postponement or removal of the matter from the roll is presumptuous. An application for reconsideration does not automatically suspend the hearing of a case. There was no reason preventing me from hearing the action. Resultantly, the action was neither postponed nor removed from the roll. Mr Jankowitz, for the plaintiff, was ordered to proceed.

[6] The background facts are largely common cause. On 26 April 2021 the plaintiff was standing on the pavement next to her parked motor vehicle with registration No C[...] 1[...] N[...] at 5[...] C[...] Road, Memorial Road Area, Kimberley at around 12:40 in the afternoon with the passenger door open. It was right in front of her residence. A collision occurred where she was knocked down by a motor vehicle with registration particulars C[...] 0[...] N[...] driven by Mr Joseph Johannes Kruger (the insured driver) who had lost control of his vehicle while busy on his cellphone. The accident has left her quadriplegic. She was attended to at various hospitals and seen by various doctors who dispensed to her medication dispatched from various pharmacies as specified in the index: medical accounts. She is also under the care of specified caregivers.

[7] In substantiation of the claim for past medical expenses, Mr Jankowitz adduced the evidence of Mrs Martha Aletta Visser, the plaintiff, who testified from a wheelchair. She explained that she was involved in an accident on 26 April 2021 around 12:40 which led her to be treated in numerous medical institutions. The plaintiff went through a bundle marked ‘Medical Expenses out of Pocket’, contained in Bundle 1 of 6, and set out the expenses and vouchers related to her medical and hospital treatment. She confirmed the medical accounts as presented in support of her claim. She added that although the medical aid paid the medical accounts, she and her husband paid the surplus (commonly referred to as co-payments) not covered by the medical aid. She does not remember the names of all the doctors who attended to her medical condition but could identify the familiar names. Her husband is the main member of the medical aid. They jointly paid in an

amount of R285 209.85 out of their pocket. She has no knowledge of the amounts paid by the medical aid as her husband, as the main member, is responsible for and receives the statements.

[8] Mr Mogano was afforded the opportunity to cross-examine the plaintiff. He however did not cross-examine her, submitting that he has no instructions from his client to do so. Mr Mogano added that the medical bills required scrutiny by experts to ascertain what is related to the accident and what is not.

[9] The next witness to testify on behalf of the plaintiff was her husband, Mr Leon Andries Louis Visser. He is a member of the POLMED medical aid and the plaintiff is his dependant. He confirmed that his wife attended various hospitals and a rehabilitation centre. They both paid in an amount of R285 209.85. He received the medical bills. In total, POLMED paid R1 442 226.02. Visser further testified that after Stanton J's order of 5 October 2023, he acquired a specially adapted wheelchair for his wife in the amount of R305 544.90 due to her aforesaid serious disability. Mr Mogano did not cross-examine this witness either for the same reasons alluded to earlier.

The plaintiff closed her case.

[10] The defence did not adduce any evidence. It follows that the plaintiff's case is uncontroverted.

[11] Mr Jankowitz, relied on *Rayi NO v Road Accident Fund*[1] where the court considered the question whether the defendant (RAF) was liable to compensate the plaintiff for the past hospital and medical expenses in light of the fact that they have already been paid by Bonitas. In answering the question in the affirmative, Zondi J, then, explained that the medical aid can recover from the RAF the payment it made on behalf of the plaintiff and for which the RAF is primarily responsible by way of action based on the

[1] Rayi NO v Road Accident Fund (343/2000) [2010] ZAWCHC 30 (22 February 2010; [2010] JOL 25238 (WCC)

principle of subrogation. Zondi J further expressed the view that settlement by Bonitas of the plaintiff's past medical expenses does not relieve the RAF of its obligation to compensate the plaintiff for the past medical expenses he incurred. The Court ordered the RAF to pay the past medical expenses incurred by the plaintiff. I fully agree with Zondi J's reasoning. For a detailed explanation on the requirements of subrogation see LAWSA Joubert et al.[2]

[12] Section 17(1)(a) of the Road Accident Fund Act [3] provides:

> '(1) The Fund … shall 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; 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, ….caused by or arising from the driving of a motor vehicle* by any person at any place within the Republic, if the injury ….is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle…..' (own emphasis added)

Interpreting this section by attaching its ordinary grammatical meaning, one can assertively conclude that the intention of the legislature was not to exclude the plaintiff's past medical expenses in her recovery of losses and damages as a result of her bodily injuries. Responsibility still lies with the RAF to compensate the injured person.

[13] Kondile AJ, writing for a unanimous court in *Engelbrecht v Road Accident Fund and Another*[4] elucidated the purpose of the Act and said:

> '[23] … The stated primary concern of the Legislature in enacting these statutes is, and has always been, "to give the greatest possible

[2] The Law of South Africa, Second Edition, Volume 12, Part 2, LexisNexis, Para 72
[3] The Road Accident Fund Act 56 of 1996
[4] Engelbrecht v Road Accident Fund and Another 2007 (6) SA 96 (CC) para 23

protection to persons who have suffered through a negligent or unlawful act on the part of the driver or owner of a motor vehicle."'

[14] In *Discovery Health (Pty) Ltd v Road Accident Fund and Another*[5], Mbongwe J had the opportunity to consider an application brought on an urgent basis by Discovery seeking an order setting aside a directive issued by the RAF on 12 August 2022 directing that all claims for past medical expenses made by the claimants for damages arising out of motor vehicle accidents and where such expenses were paid by medical aid schemes, were to be rejected. The RAF's reasoning was that the claimants in such circumstances would not have suffered any loss or incurred such expenses. Discovery opposed the RAF's directive contending that it was unlawful and inconsistent with the provisions of s 17 of the Road Accident Fund Act 56 of 1996 which imposes an obligation on the RAF to pay the claimants proven damages, including past medical expenses. On 26 October 2022, the Court declared the directive issued on 12 August 2022 unlawful, reviewed it and set it aside. The Court further interdicted and restrained the RAF from implementing the said directive.

[15] The SCA has in *Erasmus Ferreira & Ackermann and Others v Francis*[6] remarked that:

> '[16] As a general rule the patrimonial delictual damages suffered by a plaintiff is the difference between his patrimony before and after the commission of the delict. In determining a plaintiff's patrimony after the commission of the delict advantageous consequences have to be taken into account. But it has been recognised that there are exceptions to this general rule.'

Anchored on this precedent, it is therefore sensible that when considering compensation for delictual damages one has to consider the patrimonial situation before and after the delict was committed. I am further mindful of

[5] Discovery Health (Pty) Ltd v Road Accident Fund and Another [2022] JOL 57493 (GP)
[6] Erasmus Ferreira & Ackermann and Others v Francis 2010 (2) SA 228 (SCA) para 16

the pronouncement by Olivier JA[7] emphasizing that there is no single test to determine which benefits are collateral and which are deductible but it is acknowledged that policy considerations of fairness ultimately play a determinative role.

[16] There is no gainsaying the extent of the injuries that the plaintiff has suffered. As stated earlier, she is now quadriplegic. It is not an excuse that the RAF could not interrogate the medical bills to ascertain which ones are related to the accident because the documents were discovered on 18 January 2023. This clearly gave the RAF more than ample time to conduct its intense verification. The mere fact that POLMED has settled the medical bills does not relieve the RAF of its obligation to compensate Mrs Visser for the past medical expenses incurred. It would be entirely up to POLMED to recover from the plaintiff what it is entitled to, if anything. This will only come into effect once the plaintiff has been fully compensated by the RAF.

[17] Mr Jankowitz handed in two proposed Draft Orders. The first amount is R1 727 435.87 which excludes the wheelchair acquired after Stanton J’s order and medical accounts and vouchers under cover of the Notice in terms of Rule 35(9) served on the State Attorney 31 July 2024 and filed on 01 August 2024. The second amount of R2 032 980.77 includes the additional amount of R305 544.90 comprising the wheelchair and the necessities due to the plaintiff’s incapacity. He submitted that the latter draft is more appropriate as acquisition was necessitated by the sequelae of her injuries. I agree. I therefore find the RAF liable for the plaintiff’s past medical expenses paid by POLMED following the motor vehicle accident.

[18] Coming to the question of costs. There is no reason why the costs should not follow the result. For purposes of this trial, only bundle 1 and 2 were referred to.

[19] In the result, the following order is made:

[7] Standard General Insurance Co Ltd v Dugmore NO 1997 (1) SA 33 (A) at 41E -42B

1. The defendant shall pay the plaintiff a capital amount of R2 032 980.77 in respect of plaintiff's claim for past medical and hospital expenses.

2. The capital amount is payable by means of direct transfer into the trust account of the plaintiff's attorney; Stefan Greyling Incorporated – Trust Account, First National Bank, Menlyn Maine, branch code: 2[...], account number: 6[...], reference V[...].

3. The plaintiff shall allow the defendant 180 (one hundred and eighty) calendar days to make payment of the capital amount calculated 14 (fourteen) days after date of this order, failing which the plaintiff will be entitled to recover interest at the prescribed rate of interest.

4. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include counsel's fees in respect of attending the trial proceedings on 12 August 2024 and preparation of the heads of argument.

5. The plaintiff shall, in the event that costs are not agreed, serve a notice of taxation on the defendant's attorney of record; and

6. The plaintiff shall allow the defendant 180 (one hundred and eighty) days to make payment of the taxed costs.

MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the plaintiff:	Adv. DC Jankowitz
Instructed by:	Adams & Adams

	c/o Stefan Greyling Inc
For the defendant:	Mr A Mogano
Instructed by:	The State Attorney