



REPUBLIEK VAN SUID-AFRIKA

29/98

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

CASE NO: 204/96

In the matter of:

**FREE STATE CONSOLIDATED GOLD MINES
(OPERATIONS) LIMITED t/a THE ERNEST
OPPENHEIMER HOSPITAL**

Appellant

and

**THE MULTILATERAL MOTOR VEHICLE
ACCIDENTS FUND**

Respondent

CORAM: HEFER, SMALBERGER, NIENABER, SCOTT
JJA et MELUNSKY AJA

HEARING: 19 March 1998

DELIVERED: 27 March 1998

J U D G M E N T

HEFER JA

HEFER JA

Art 44 of the Schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 provides that, subject to certain qualifications which are not presently relevant,

"[w]here a third party is entitled to compensation in terms of this Chapter and has incurred costs in respect of accommodation of himself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (in this case called the supplier) may claim the amount direct from the MMF or its appointed agent ..."

The appellant owns the Ernest Oppenheimer Hospital in Welkom. It invoked art 44 in an action instituted against the respondent (the "MMF") in the Orange Free State Provincial Division for the recovery of the costs which it alleged had been incurred in respect of the treatment of Mr M F Foko for injuries sustained in a motor collision. The MMF joined issue *inter alia* on the question whether Mr Foko had "incurred costs" within the meaning of that expression in art 44. The trial court

(Lombard J) found that he had not, and dismissed the claim but subsequently granted leave to appeal.

The issue to which I referred is the only one in the appeal. It involves two separate but related questions. The first is whether, as the MMF contends, the remedy is only available where the third party has become personally liable to the supplier for the costs of his treatment; or whether, as the appellant maintains, such a liability is not required. The trial court accepted the MMF's contention. If this ruling is correct the second question is whether personal liability on Mr Foko's part has been established. The trial court found that it had not.

Although both questions were argued I will not concern myself with the interpretation of art 44 because I am of the view that the finding on the second question cannot be sustained. I will accordingly assume in the MMF's favour that, for the appellant to succeed, Mr Foko's liability to the appellant had to be established and proceed to demonstrate why I am of the opinion that this requirement has been met.

The court *a quo*'s judgment has been reported (see *Free State*

Consolidated Gold Mines (Operations) Ltd t/a The Ernest Oppenheimer Hospital v Multilateral Motor Vehicle Accidents Fund 1997(4) SA 930).

I accept the court *a quo*'s credibility findings recorded at 940F-G. My disagreement stems from the remarks at 944I-945A to the effect that, viewed from the appellant's side, there was no suggestion that Mr Foko would be personally liable for the costs of his treatment and that this is how he himself understood the position. These remarks go to the pith of the enquiry. Why I am unable to accept their validity will emerge from what follows.

A comprehensive account of the evidence appears in the reported judgment. What needs to be stressed at the outset is that, although the Ernest Oppenheimer hospital is closely associated with the mines on the Free State goldfields and presumably caters largely for mine employees, it is administered as a business venture like any other private hospital. It admits every patient who is prepared to pay for his treatment and, unless other arrangements are made, every patient obviously expects to be charged. Accordingly, in the absence of

express agreement, he is admitted on the clear understanding that he will be liable for the costs of his treatment. Mr Foko was employed on one of the appellant's mines but his injury occurred off mining property and did not relate to his work. His service agreement did not provide for free medical treatment for injuries sustained in circumstances like these. Had it not been company policy to admit and treat such a patient even though he might not be able to pay, Mr Foko would plainly have been liable for the costs of his treatment. It would have been a typical case of a patient being admitted to a hospital in terms of a tacit agreement by virtue of which he assumes liability for payment of the hospital's usual charges. That the policy required him to be treated differently simply means, as I see it, that he assumed liability for the costs on the hospital's usual terms for patients of his particular kind.

This is but another way of saying that Mr Foko was treated in terms of a tacit agreement that he would be liable in accordance with the appellant's policy - a submission made by appellant's counsel. The only response from the MMF's counsel was that, whatever the policy

might actually have entailed, Mr Foko was under the impression that he would be treated free of charge. But this is not how I understand his evidence. He was not asked what his impression regarding his liability was; nor is there room for an inference from the available evidence that he probably laboured under the impression that he would receive free treatment. All that he said was that he had never paid for medical treatment at the hospital and that he had never heard of other mineworkers having to pay. But no one saw fit to enquire whether he had in fact been treated in the hospital before and, if so, what the nature of his previous ailment was in order to discover whether it related to his work or not; nor does any one seem to have been interested to know whether other mineworkers had to his knowledge been treated for unrelated injuries. Nothing can be inferred from these scanty bits of information. This is basically why I do not agree with the trial court's finding that Mr Foko understood that he would not be liable. Unfortunately the learned judge did not reveal the reasons for his finding; but, as already mentioned, Mr Foko's evidence is not to that

effect and his understanding of the situation cannot be inferred from the other evidence.

It remains to consider what precisely the policy comprised. The main source of information in this regard is the evidence of Dr Brink, the medical superintendent. But before I deal with his evidence let me say that I cannot support the court *a quo*'s reliance on the fact that the appellant played a leading role in Mr Foko's claim against the MMF (and in other claims of the same kind) as evidence that the appellant did not regard Mr Foko as the debtor. The appellant obviously and for good reason sought to protect its own interests by actively assisting Mr Foko to recover compensation, including its charges, from the MMF. As appears from 935G-H of the reported judgment this is precisely how the medical superintendent, whose evidence was accepted, explained the appellant's intervention. I will presently explain why this rather tends to show that Mr Foko was indeed regarded as the debtor.

In an effort to persuade us of the validity of their respective contentions counsel on both sides referred us to selected passages in

the record of Dr Brink's evidence. Some of these are cited in the reported judgment. It would serve no useful purpose to recount them and then deal with each in turn because, whether a patient like Mr Foko was liable for the costs of his treatment, must be decided on all the available evidence and everything that Dr Brink said must obviously be taken into account. At best one can form a general impression of the situation and cast it into a form capable of comprehension in legal terms.

My impression is that, although the policy undoubtedly envisaged the release from liability of any mine employee who was not financially in a position to pay for his treatment, it also envisaged the recovery of whatever might be recoverable from other sources. Once this is understood the position becomes clear. Other sources which were contemplated, were medical aid funds and insurance companies. An important consideration is that medical aid funds and insurance companies usually are sources of recoupment available to the patient only. That a particular patient eg carries hospital insurance or is a

member of a medical aid fund, does not avail the hospital; it only enables the patient to pay his hospital account. To discharge a patient like this from liability simply makes no sense. Another source was the MMF which differed from the others inasmuch as the appellant itself had a right of recovery under art 44. But it is significant that the appellant never exercised that right until this very case and always assisted its patients to recover compensation including its own charges. Even in Mr Foko's case the appellant's charges were first included in his claim under art 40; the present action was only instituted when the MMF disputed his right to recover them. These are clear indications that the release of the patient before all available sources of recovery had been tapped was never contemplated. What it conveys to me is that the patient was held liable for the costs of his treatment until they were recovered in whole or in part from an outside source and paid to the appellant, or at least until it emerged that there was no other source from which they could be recovered. Only when it became apparent that these avenues were closed, would the appellant write off the

account and thus waive its claim, or part of it, against the patient. Of course this did not happen in the present case because, as was indicated on Mr Foko's hospital file when he was admitted, the MMF was regarded from the outset as a source from which the costs might be recovered.

As the agreement for which the appellant contends has been established it follows -

1. that Mr Foko became and remained liable to the appellant;
2. that the MMF's liability under art 44 has been established;
- and
3. that judgment should have been entered in favour of the appellant.

I accordingly make the following order:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court *a quo* is set aside. Substituted for it is the following:

- (a) Judgment is granted in the plaintiff's favour
for payment of an amount of R20 906,51 with
interest thereon at the rate of 15,5% per
annum from 5 February 1996.
- (b) Costs of suit including the costs of two
counsel.

JJF HEFER
Judge of Appeal

Smalberger JA	}	
Nienaber JA	}	
Scott JA	}	Concurred.....
Melunsky AJA	}	