

SOUTH AFRICA / JUDGMENT

Esack N.O v Road Accident Fund [2025] ZAWCHC 27; 2025 (4) SA 201 (WCC) (4 February 2025)

[2025] ZAWCHC 27

COURT

Western Cape High Court, Cape Town

BEFORE

Nuku

CASE / FILE NUMBER

12926/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 12926/2017

In

the matter between:

RAHLDEYAH
ESACK
N.O
Plaintiff
and
THE ROAD ACCIDENT
FUND
Defendant

Coram:

NUKU J
Heard on
:
27 and 30 January 2025
Delivered

on:04 February 2025

JUDGMENT

NUKU, J

- [1] The late Mr Anwar Esack (the deceased) sustained bodily injuries on 11 December 2015 when the motor vehicle he was driving collided with another motor vehicle. Pursuant thereto he lodged a claim with the defendant and upon the latter's failure to compensate him, he instituted this action.
- [2] The deceased died on 4 May 2020 before the finalization of the matter and he was formally substituted as the plaintiff by the executrix of his estate, Ms Rahldeyah Esack who was also his spouse. The issue of defendant's liability was determined as a separate issue and only the quantum of damages remained in dispute by the time that the matter came before me.
- [3] At the commencement of the hearing I was advised by the parties' legal representatives that the parties had settled most of the heads of damages except the claim for past hospital, medical and related expenses. I was also advised that the parties had not reached agreement regarding the date from which the interest would start running as well as costs.
- [4] I was further advised that the quantum of the plaintiff's claim for past hospital, medical and related expenses was not disputed and that the defendant took issue with its liability to pay them because these expenses had been paid by the deceased's medical aid, an issue that had not been pleaded by the defendant.
- [5] The parties' legal representatives further informed me that none of the parties intended to call witnesses and in fact plaintiff's counsel commenced with his argument. I, however, indicated my difficulty in adjudicating an issue that has not been pleaded, and even worse without any evidence or stated case.
- [6] The hearing of the matter adjourned to enable the parties' legal representatives to attend to the amendment of the pleadings to properly plead the defendant's basis of its denial of liability in respect of the claim for past hospital, medical and related expenses. Additionally, the parties were to consider whether to prepare a stated case or whether to lead evidence on the issue in dispute.
- [7] The defendant amended its plea, and the plaintiff had no objection thereto. In the defendant's plea, the issue in dispute was pleaded as follows:

'7.1 Defendant pleads that plaintiff was a member of a medical aid scheme and that the said medical aid scheme paid plaintiff's past hospital and medical expenses.

7.2 Defendant further pleads in clarification that plaintiff pursuant to the above suffered no loss in respect of this head of damages therefore defendant is accordingly not liable to reimburse / compensate the plaintiff and / or the medical aid scheme of the deceased.

7.3 Alternatively, and in the event that the above honourable court finds that the plaintiff has suffered a loss and is entitled to compensation notwithstanding the fact that the past hospital and medical expenses have been paid by his medical aid scheme, defendant pleads that the past hospital and medical expenses claimed herein constitute prescribed minimum benefits (PMB) and / or treatment for emergency medical conditions (EMC) for which the medical aid scheme of the deceased is statutorily obliged to pay.'

[8] The parties also filed a statement of agreed facts the relevant part of which records that:

8.1. Whilst the deceased was still alive and in hospital, he received medical treatment and incurred medical expenses ("the medical expenses") arising from the injuries sustained in the collision.

8.2. A schedule of the medical expenses in the sum of R115 436.14 (showing the service providers, the account numbers, the dates that the services were provided, the amounts claimed, and the amounts paid by Discovery Health), is attached hereto marked "".

8.3. The deceased, at the time of the collision and when receiving the aforesaid medical treatment, was a member of the Discovery Health Medical Scheme, ("Discovery") with membership number 3[...].

8.4. Discovery paid the costs incurred in respect of the medical expenses in the sum of R115 436.14 to the relevant service providers.

8.5. Discovery paid the aforestated medical expenses pursuant to the deceased's membership of Discovery and by virtue of the contractual arrangement between itself and the deceased, as well as owing to its statutory obligation in terms of Medical Schemes Act No. 131 of 1998 and the Regulations thereto, and as further set out in the deceased's Medical Benefit Plan, and in accordance with the Rules of the Discovery Health Medical Scheme Registered under the Medical Schemes Act No. 131 of 1998, which were registered with the Registrar of Medical Societies on 19 November 2010 ("the Scheme Rules").

[9] The agreed statement of facts curtailed the need for evidence except for the issue whether the past medical and hospital expenses claimed constitute prescribed minimum benefits or treatment for emergency medical conditions for which Discovery is statutorily obliged to pay, an issue which the plaintiff was not willing to concede. Defendant's legal representative indicated that defendant would have to call a bill reviewer to testify on this issue but that he or she was not available. Plaintiff's counsel, solely for the purposes of avoiding the postponement of the matter, advised that although the issue is not formally conceded, the

court can accept for the purposes of adjudicating this matter only, that past medical and hospital expenses claimed constitute prescribed minimum benefits or treatment for emergency medical conditions for which Discovery is statutorily obliged to pay.

[10] Having taken care of the necessary pleadings as well as the facts on the basis of which the matter is to be adjudicated upon, plaintiff's

counsel proceeded to address the court on why the defendant is liable to compensate the plaintiff. On the issue of whether the plaintiff had suffered any loss in relation to the past hospital and medical expenses, plaintiff's counsel submitted that the deceased incurred these expenses and the fact that they were paid by Discovery is a private matter between him and Discovery. In this regard, plaintiff's counsel referred to a number of authorities to the effect that medical aid scheme benefits are a form of indemnity insurance that should be disregarded for the purpose of an award for damages in accordance with the common law principle of *res inter alios acta*.^[1]

[11] The submissions on behalf of the defendant were to the effect that plaintiff suffered no loss in relation to past hospital and medical

expenses. To the extent that he did, it was submitted that fairness, equity and reasonableness dictates that the plaintiff should not be compensated for these expenses because they were paid by Discovery which was statutorily obliged to do so. In this regard, plaintiff's legal representative relied heavily on a majority judgment in *Discovery Health (Pty) Ltd v Road Accident Fund and another*^[2] (*Discovery Health*). In the defendant's view, *Discovery Health* changed the legal landscape in so far as the common law principle of *res inter alios acta* such that benefits from a medical aid scheme in circumstances where the medical aid scheme is statutorily obliged to pay fall to be deducted in the computation of a claim for past hospital and medical expenses. The question therefore is whether *Discovery Health* indeed changed the legal landscape in so far as the common law principle of *res inter alios acta*.

[12] The majority judgment in *Discovery Health* contains an interesting discussion on the development and incorporation of the common law principle of *res inter alios acta* starting with the decision of the Appellate Division in *Santam Versekeringsmaatskappy Bpk v Byleveldt*^[3] (*Byleveldt*) which the judgment suggests is the authority for the proposition that "the question of which collaterals are deductible must be determined by reference to equity, reasonableness and public policy."^[4] The majority judgment proceeds to discuss another decision of the Supreme Court of Appeal in *Standard General Insurance Co Ltd v Dugmore N.O*^[5] (*Dugmore*) where the Supreme Court of Appeal made the point that "it now seems to be generally accepted that there is no single test to determine which benefits are collaterals and which are deductible." To further elucidate this point the majority judgment then refers to the decision of the Supreme Court of Appeal in *Erasmus Ferreira & Ackerman v Francis*^[6] (*Francis*) where Cachalia JA stated:

‘In light of the foregoing I agree with Neethling, Potgieter & Visser Law of Delict 5 ed (2006) at p 215-16 that ‘(q)uestions regarding collateral benefits are normative in nature; they have to be approached and solved in terms of policy principles and equity’, and that in doing so ‘there should always be a weighing-up of these interests of the plaintiff, the defendant, the source of the benefit as well as the community in establishing how benefits resulting from a damage-causing event should be treated.’

[13] Having discussed the cases referred to above, the majority judgment proceeds to discuss a decision of the Supreme Court of Appeal which restated the principle without deciding whether the benefits had to be deducted from the award, and states:

‘This, the Supreme Court of Appeal confirmed in *Road Accident Fund v Cloete NO and Others*[7], a mere ten days later after *Bane v D’Ambrosi*,[8] which, as we know, concluded that payment made by a claimant’s medical scheme is *res inter alios acta*.’

[14] Finally the majority judgment poses the question “Whether there are any policy considerations in favour of excluding collateral benefits received by a claimant from a medical scheme by way of payment of PMB’s and EMC’s, on the basis of *res inter alios acta*?” Immediately thereafter the majority judgment proceeds stating that “We raise the following considerations without necessarily answering the question...” Having raised various considerations, the judgment concludes as follows:

‘Given the myriad of social challenges facing this developing country, is there justification based on policy considerations, fairness and reasonableness, for the government to concern itself with protecting the interests of medical schemes? The contestation before us is simply about whether RAF’s funds should continue being used to replenish the coffers of medical schemes. The subrogation principle perpetuates the lie that a road accident victim has a claim against the RAF when in truth and in fact, that claim was satisfied by the medical scheme.’

[15] In my view *Discovery Health* has not changed the legal landscape for the reasons that follow. The first problem that the majority judgment would fall foul of the doctrine of *stare decisis*, a fundamental principle of our law that requires High Courts to follow decisions of the Supreme Court of Appeal and the Constitutional Court. The issue of deductibility of medical-aid scheme benefits was dealt with by the Supreme Court of Appeal in *Bane* which concluded that “the Medical Schemes Act did not have the effect of depriving plaintiffs of their claims for hospital and medical expenses in delictual actions.”

[16] Whilst *Bane* did not deal specifically with the deductibility of PMB’s and EMC’s but the deductibility of medical-aid benefits in general terms, I can see no basis to differentiate between the two. I say this because the argument in *Bane* appears to have been based on the fact that medical schemes are obliged to accept members upon application, an argument that is not so dissimilar to an argument that claimants should not be compensated in respect of PMB’s and EMC’s because the medical schemes are statutorily obliged to pay these.

- [17] The other difficulty with the majority judgment in *Discovery Health* is that the court was not required and in fact did not decide the issue of deductibility of payments made by medical aid schemes from compensation to be paid to road accident victims. This, the majority acknowledged when it stated that “We raise the following considerations without answering the question.” That said, it must follow that *Discovery Health* lends no support to the defendant’s argument that it is not liable to compensate the plaintiff in respect of past hospital and medical expenses that have been paid by the deceased’s medical-aid scheme as part of the PMB’s or EMC’s.
- [18] Lastly, accepting for a moment that the deductibility of collaterals is a matter that should be determined with regard to public policy consideration, fairness, equity and reasonableness no such considerations were brought to the court’s attention. All that the defendant’s legal representative did was to restate the principles discussed in *Discovery Health* without presenting any evidence in support of the proposition that the public policy considerations, fairness, equity and reasonableness dictate that the defendant should not be held liable to compensate a road accident victim in respect of past medical and hospital expenses which have been paid by the victim’s medical-aid scheme as part of its obligation to pay for PMB’s and EMC’s.
- [19] To conclude on the issue, the deceased incurred past medical and hospital expenses. These were paid by the deceased’s medical-aid scheme, and I have been asked to assume, only for the purpose of deciding the issue in this matter, that the past hospital and medical expenses paid by the deceased’s medical aid scheme relate to PMB’s. On the application of the common law principle
- of *res inter alios acta*, the defendant is liable to compensate the plaintiff as such payment is a matter between the deceased and his medical aid-scheme. Having regard to all of the above, I am satisfied that the plaintiff’s claim for past hospital and medical expenses must succeed.
- [20] The only other issue that the parties could not agree on is the date from which the interest starts running, a matter provided for in section 17 (3) of the Road Accident Fund Act 56 of 1996 (the Act), as well as costs of suit. Section 17 (3) (a) of the Act provides that “No interest calculated on the amount of any compensation which a court awards to any third party by virtue of the provisions of subsection (1) shall be payable unless 14 days have elapsed from the date of the court’s relevant order.” In the absence of an agreement between the parties varying the statutory position, the court enjoys no authority to order otherwise, and I was not referred to any authority to the contrary. The interest will, thus, be calculated on the amounts awarded to commence after the expiry of 14 (fourteen) days from the date of judgment.
- [21] As regards costs, the plaintiff has been successful and as such the usual rule that costs should follow the result must apply. There was a debate between the legal representatives about the scale of such costs with the plaintiff contending for scale C whilst defendant contended for scale A. One of the issues that were relied upon by plaintiff’s counsel was the

fact that it was not an easy task computing the deceased's past loss of income as he had been a self-employed businessman, an aspect that required not only the involvement of an industrial psychologist but also an earnings expert, in the computation of his claim for past loss of earnings.

- [22] Claims for past loss of earnings usually involve what one may call, for lack of a better word, mathematical calculation. This, however, is not always the case in respect of self-employed businesspeople whose earnings are sometimes complicated by the fact that they usually structure same in a cost efficient manner that does not always make it readily discernible how much the person actually earns. That the plaintiff has had to engage the services of an earnings expert lends support, in my view, that the computation of the deceased's past loss of earnings was not a straight forward matter. In my view the costs on scale B are warranted and will be awarded until 27 January 2025.
- [24] There was also a further debate regarding further costs incurred post 27 January 2025, this being the date when most heads of damages were settled except for past hospital and medical expenses. It was contended on behalf of plaintiff that a punitive costs order is warranted in this regard because the defendant, in essence pursued a hopeless case contrary to established legal principles. It was submitted on behalf of the defendant that there should be no separate order in respect of events post 27 January 2025.
- [25] The matter could have been finalised on 27 January 2025 when most of the heads of damages were settled. What remained unresolved, mainly, was the plaintiff's past hospital and medical expenses, an issue that the defendant raised in court without it having been pleaded. As a result, the matter had to stand down to afford the defendant an opportunity to consider its position and to decide whether it would seek an amendment of its plea.
- [26] Clearly, in my view, the defendant was not prepared to proceed with its defence in respect of past hospital and medical expenses. This is extraordinary when one considers that actions against the Road Accident Fund have to go through certification by two judges before they are allocated a hearing date. The fact that the issue of the plaintiff's claim for past hospital and medical expenses was not pleaded can only be an indication that the issue arose after the matter was certified by both judges, thus an afterthought. As a matter of fact, it appears that the defendant's stance was based on the majority judgment In Discovery Health which was delivered on 17 December 2024.
- [27] However one may be tempted to adopt a sympathetic attitude towards the defendant in the sense that the defendant may have thought that the majority judgment in Discovery Health changed the legal landscape on the application of the common law principle of *res inter alios acta*, on any proper reading of the judgment that was not an issue that the court had to decide. By proceeding with the contrived defence which incidentally mirrors one of the internal directives issued by the defendant, this resulted in the plaintiff incurring additional

expenses that could have been totally avoided and in my view the plaintiff should not be out of pocket because of the avoidable

conduct of the defendant.

[28] It may well be that the defendant may one day bring a case which calls for proper reconsideration of the application of the common law principle of *res inter alios acta*, but the defendant was evidently not even prepared to properly advance that case in the present matter. Having regard to all of the above, I am of the view that attorney client costs are warranted for costs incurred post 27 January 2025.

[29] In the result I make the following order:

29.1. The Defendant shall, by agreement between the parties, pay to Plaintiff's attorneys of record the sum of R 935 477.28 (Nine Hundred and Thirty-Five Thousand Four Hundred and Seventy-Seven Rand and Twenty-Eight Cents) in respect of the deceased's past loss of earnings.

29.2. The Defendant shall pay the Plaintiff's attorneys the further sum of R 115 436.14 (One Hundred and Fifteen Thousand Four Hundred and Thirty-Six Rand and Fourteen Cents) in respect of the deceased's past hospital and medical expenses.

29.3. The capital amounts referred to in paragraph 1 and 2 above shall be paid to Plaintiff's attorneys of record by means of an electronic transfer of funds, which amount is to be paid within 180 (One Hundred and Eighty) calendar days from date of this Order.

29.4. The Defendant shall pay Plaintiff's taxed or agreed costs on the High Court Scale to date hereof, including but not limited to, the costs as set out hereunder, and which costs are to include:

29.5. The costs incurred by Plaintiff's attorneys in instituting and prosecuting this action, as well as all costs attendant upon the obtaining of payment of the capital amount referred to above;

29.6. The taxed or agreed fees, expenses and allowances incurred in relation to Plaintiff's experts, including their preparation and qualifying fees and all reasonable and necessary costs attached to the preparation and procurement of their expert reports, as well as other related costs such as X rays, Form 4 (serious assessment), addendum reports, collateral procurement, and consultations.

29.7. The taxed or agreed fees of Plaintiff's Counsel, on scale B where applicable, including but not limited to Counsel's trial preparation, including the preparation of written submissions, and his day fees in respect of the hearing of the trial on 27 and 30 January 2025.

29.8. The Plaintiff's experts are:

29.8.1. Dr Theo Le Roux (orthopaedic surgeon);

29.8.2. Dr Domingo (neurosurgeon);

29.8.3. Dr Ostrofsky (maxilla-facial and oral surgeon);

29.8.4. Dr Hunter (industrial psychologist);

29.8.5. Jean Beelders (earnings specialist);

29.8.6. Munro Forensic Actuaries (actuary).

29.9. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant.

30. The scale of the Plaintiff's costs in the matter shall be on a party and party scale, save that the costs incurred in relation to the hearing on 27 and 30 January 2025 respectively, which related exclusively to argument on the past hospital and medical expenses, shall be paid on an attorney and client scale.

31. The payment of the legal costs shall be payable 180 (one hundred and eighty) calendar days following settlement or the taxing master's allocator, in the event of taxing the bill of costs, whichever is applicable.

32. Payment of the amounts reflected in paragraphs 1, 2 and 3 above shall be effected directly to Plaintiff's attorneys of record by means of an electronic transfer into the trust account mentioned below.

33. The Defendant shall be liable for interest on the capital sum at the prescribed rate of interest from 14 (fourteen) days from date

of this Order to date of final payment.

34. The Defendant shall be liable for interest on the legal costs, referred to in paragraph 4, at the prescribed rate of interest from

14 (fourteen) days following settlement of the costs or the taxing master's allocator, in the event of taxing the bill of costs, whichever is applicable.

35. Plaintiff shall not proceed with a warrant of execution in respect of the capital and costs prior to the expiry of the said 180 calendar days.

36. It is further recorded that Plaintiff has concluded a contingency fee agreement with his attorneys and that Plaintiff and her attorney have complied with section 4(1) and (2) of the Contingency Fees Act 66 of 1997, having filed the required affidavits with the Court.

37. Plaintiff's attorney's trust banking account details are as follows:-

NAME OF BANK:

BRANCH:

NAME OF ACCOUNT:

ACCOUNT NO.:

BRANCH CODE NO.:

L.G. Nuku

Judge of the High Court

APPEARANCES

For applicant:

Adv. Wayne Coughlan

Instructed by:

Messrs Sohn & Wood Attorneys

For the defendant: Mr Craigh Hindley: State Attorney

[1] Thomson v Thomson 2002 (5) SA 541 (W) at 547H-I, Mooideen v Road Accident Fund, an unreported judgment under case number 17737/2015 delivered on 11 December 2020, Road Accident Fund v Malgas, an unreported judgment of Van Zyl DJP in an application for leave to appeal under case number 126/2020 Eastern Cape Local Division, Gqeberha, delivered on 5 March 2024, Banda v Road Accident Fund (5168/2021)

[2024] ZAGPJHC 483 (09 May 2024 at para [15], Van Tonder v Road Accident Fund (1736/2020; 9773/2021) [2023] ZAWCHC 305 (01 December 2023, Fookwe v Road Accident Fund (23481/2016) [2024] ZAWCHC (29 April 2024); Gunther v Road Accident Fund (24228/16)

[2024] ZAWCHC 153 (06 June 2024)

[2] Discovery Health (Pty) Ltd v Road Accident Fund and Another (2023/117206)

[2024] ZAGPHC1303 (17 December 2024)

[3] 1973

(2) SA 146 (A)

[4] At para [70]

[5] 1997

(1) SA 33 (SCA)

[6] 2010

(2) SA 228 (SCA) at para [17]

[7] 2010

(6) SA 120 (SCA)

[8] 2010

(2) SA 539 (SCA)

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