

SOUTH AFRICA / JUDGMENT

K.C.M v Grobler Vorster Incorporated (1059/2012) [2014] ZANWHC 39 (11 September 2014) [2014] ZANWHC 39

COURT

North West High Court, Mafikeng

BEFORE

GUTTA

CASE / FILE NUMBER

1059/2012

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“IN

THE HIGH COURT OF SOUTH AFRICA”

NORTH

WEST HIGH COURT, MAHIKENG

CASE

NO. 1059/2012

In

the matter between:

K.

C.

M.

PLAINTIFF

and

GROBLER

VORSTER INCORPORATED

DEFENDANT

JUDGMENT

GUTTA J.

A.

INTRODUCTION

- [1] The plaintiff instituted an action in her capacity as mother and natural guardian of S. A. M., a minor child (“the minor”), against the defendant for professional negligence.
- [2] The defendant raised a special plea, and at a pre-trial conference before Hendricks AJP, the parties agreed to separate the issues, with the special plea to be adjudicated first.
- [3] This judgment is in respect of the special plea, which was argued before me by counsel for the plaintiff and the defendant.

B.

BACKGROUND

- [4] The facts briefly are as follows:

- 4.1 the minor was involved in a motor vehicle accident, wherein he sustained bodily injuries;
- 4.2 as a result of the injuries and sequelae, the plaintiff suffered damages;
- 4.3 the defendant was instructed by the plaintiff to lodge a claim against the Road Accident Fund (“the RAF”) and to prosecute the claim to finality;
- 4.4 the plaintiff alleged that the defendant was to provide the service in a proper and professional manner and without negligence;
- 4.5 she alleged that the defendant breached the agreement and was negligent as he failed to properly investigate and assess the quantum of the plaintiff’s claim and accepted a settlement that was not commensurate with the nature of the injuries and extent of the sequelae;
- 4.6 the plaintiff accordingly claimed damages as a result thereof;
- 4.7 the defendant raised a special plea, wherein he averred the following:

“2. Defendant avers that:

- 2.1 Any settlement entered into between the Defendant and the Road Accident Fund is void or voidable in law in that it was not in the best interest of the minor child;
- 2.2 By virtue of these proceedings Plaintiff does not consider the settlement binding on her.

3. Without derogating from the foregoing, and in the alternative, the Defendant pleads that at the time the settlement entered into between itself and the Road Accident Fund it was patently clear that the settlement aforesaid was for an amount significantly less than the true value of the claim, and in the event that such settlement is valid, then such settlement is required to be set aside, in that it was not made in the best interest of the minor child and the principle of restitutio in intergrum should apply;
4. Having regard to the foregoing, the Plaintiff's claim against the Defendant is premature in that the Plaintiff has not exhausted all her remedies as against the Road Accident Fund by having the settlement set aside."

(Own emphasis)

4.8 the defendant prayed, in the special plea, that the plaintiff's claim be dismissed with costs;

4.9 at the hearing, the defendant applied for an amendment to the relief sought to include an alternative prayer that "alternatively, in the event the court finds that the claim is premature that the plaintiff's claim be stayed pending such time that the plaintiff has exhausted all her other remedies, such order as to costs as the court deems just.";

4.10 I granted the amendment, which was not opposed.

C. ISSUE

- [5] As the RAF was not a party to the proceedings, clarity was sought from the parties as to the central issue for determination and there was consensus that the only issue for determination is whether the plaintiff's claim was premature and whether the plaintiff should have first launched an application to set aside the settlement agreement between the plaintiff and the RAF, on the grounds that it is void or voidable, alternatively on the principle of restitutio in intergrum that it was not in best interests of the minor.

D. THE PLAINTIFF'S CASE

- [6] Counsel for the defendant, Mr Shirilele, relied on the RAF's legal duties in terms of the Road Accident Fund Act 56 of 1996 ("the Act"), and submitted, inter alia, the following:

6.1 that the purpose of the Act was to compensate persons injured as a result of negligent driving of motor vehicles;

6.2 that the RAF has specific duties created by virtue of the Act, including the duty to investigate claims, settle claims, investigate the extent and consequences of injuries suffered by claimants and to pay claimants reasonable compensation;

6.3 he referred to several authorities in his heads of argument, where Courts have commented on the nature and extent of the functions, obligations and duties of the RAF;

6.4 it is clear from the authorities referred to that it is firmly established in our law that the RAF is obliged to provide the greatest possible protection to victims of motor vehicle accidents.

6.5 the RAF has failed to provide the minor with the greatest possible protection and to provide fair and reasonable compensation in that the offer made by the RAF, on the evidence available to it at the time, was inadequate;

6.6 the offer made was not in the best interest of the minor, having regard to the provisions of section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”) and section 6(2) of the Children’s Act 38 of 2005 (“the Children’s Act”).

[7] Mr Shirilele also relied on the legal remedy of restitutio in intergrum and submitted, inter alia, the following:

7.1 the remedy available to a minor who seeks to escape the effect of a contract concluded on his or her behalf by his or her guardian on the ground that the contract was inherently prejudicial to his or her interests, is a claim for restitutio in intergrum;

7.2 the test is whether the contract was concluded in the best interests of the minor at the time that it was concluded. Under the common law, in exercising its discretion as upper guardian, the Court’s paramount consideration is always the best interests of the child in question. Both constitutional and international law enshrine ‘the best interests of the child’ standard as ‘paramount’ or ‘primary’ consideration in all matters concerning children in South Africa. So, in terms of section 28(2) of the Constitution, “(a) child’s best interests are of paramount importance in every matter concerning the child’. He also relied on the Children’s Act;

7.3 the medico-legal evidence presented by the plaintiff indicates that the claim was settled for significantly less than its true value. It also show that the offer of settlement, at the time it was made, was prejudicial and not in the best interests of the minor;

7.4 the only reasonable conclusion that can be reached is that this claim was not properly assessed, and the offer and the acceptance by the defendant was not in the minor’s interests and was prejudicial to him;

7.5 a claim that is prejudicial to a minor is capable of being set aside, as set out in the recent decision of Road Accident Fund v Myhill N.O (505/2012) [2013] ZASCA 73 (29 May 2013).

E. THE DEFENDANT’S CASE

[8] Counsel for the plaintiff, Mr Leballo, submitted, inter alia, the following:

8.1 he drew a distinction between this case and the decision of Road Accident Fund v Myhill N.O supra, and said that in the Road Accident Fund v Myhill N.O matter, the plaintiff elected to proceed against the RAF and not the defendant’s attorneys, while in this matter the plaintiff elected to issue summons against the attorneys;

8.2 the Road Accident Fund v Myhill N.O decision did not abolish the plaintiff’s right to institute action against negligent attorneys for professional negligence;

8.3 the defendant cannot dictate or direct against whom the dominus litis should proceed with its claim. The claim by the plaintiff is for breach of agreement. See *Administrator, Natal v Edouard* [1990] ZASCA 60; 1990 (3) SA 581 (A);

8.4 the defendant should have made an application for joinder or third party. If a party has a direct and substantial interest in any order the Court might make in proceedings, he is a necessary party.

F.

ANALYSIS

[9] The question that I posed to Mr Shirilele was, on what basis in law can this Court rule that the plaintiff's claim is premature? Mr Shirilele was unable to provide a satisfactory answer.

[10] The authorities cited by Mr Shirilele are relevant in so far as the functions, obligation and duties of the RAF are concerned and I agree with the comments of Leach JA in *Road Accident Fund v Myhill N.O supra*, namely:

“... that the Defendant (RAF) was mandated by virtue of the provisions of Section 4(1)(b) of the Act to investigate and settle, subject to Act, claims arising from loss or damage caused by the negligent driving of a motor vehicle. It is alleged that the defendant was and is obliged in terms of Act and law to pay reasonable compensation to road accident victims and in particular minors.”

The Court, in its finding, took cognisance of the seriousness of the injuries and the evidence of epilepsy and ultimately found that the compromise was not in the best interests of the minor.

[11] The High Court possesses an inherent jurisdiction to stay proceedings which constitute an abuse of the process of the courts. This power is generally exercised in circumstances where the process is vexatious, frivolous or oppressive.

[12] However, the power to stay is exercised sparingly since the courts of law are open to all, and the doors will only be closed “in very exceptional circumstances”. See *Clipsal Australia (Pty) Ltd & Others v GAP Distributors & Others* 2010 (2) SA 298 (SCA) at 298B–C, paragraph [19].

[13] No exceptional circumstances were presented to this Court, nor was it the defendant's case that the plaintiff's cause of action is vexatious, frivolous or oppressive, or that such proceedings are automatically stayed.

[14] It is indeed trite that the Court is the upper guardian of minor children, and as such the best interests of the minor child is the paramount consideration. See *Road Accident Fund v Myhill N.O supra*, at paragraph 37; section 6(2) of the Children's Act.

[15] In casu, it is common cause that the settlement reached between the plaintiff and the RAF was not in the best interests of the minor. The reasons for same could be attributed to both the RAF and the legal representatives for the minor when the settlement agreement was reached. The plaintiff elected to institute an action against the minor's legal representatives.

The plaintiff's election to claim damages from the minor's legal representative as opposed to instituting an application against the RAF to set aside the agreement, does not constitute an abuse of the process to warrant a stay of the proceedings.

- [16] The liability of an attorney towards his client, for damages caused as a result of his negligence is based upon a breach of the contract between the parties. It is an implied term of the mandate that the attorney will exercise the skill, adequate knowledge and diligence expected of an average practicing attorney. See *Amler's Precedents of Pleadings*, 4th Ed. Harms, page 42.
- [17] The plaintiff's claim is based on medical negligence. A court adjudicating the action will ultimately after considering the facts and evidence, and the law, make a finding on whether the defendant was negligent, and if the defendant was negligent, then award damages to the plaintiff.
- [18] The Court has no discretion to stay proceedings in order to avoid an injustice or inequality. See *Fisheries Development Corporation of SA Ltd v Jorgensen*, *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1979 (3) SA 1331 (W).
- [19] In *Argus Printing & Publishing Co. Ltd v Anastassiades* 1954 (1) SA 72 (W), the Court held that dismissal should not be ordered without hearing evidence, "unless it is manifest that the action is so unfounded that it could not possibly be sustained. It must be quite clear that failure of the action is a foregone conclusion".
- [20] There is no evidence that the plaintiff's case is unfounded and cannot be sustained.
- [21] Section 34 of the Constitution provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".
- [22] Section 36 of the Constitution provides for the limitation of rights only in terms of law of general application to the extent that the limitation is reasonable and justifiable.
- [23] The plaintiff has a constitutional right to litigate and to elect the cause of action to recover damages. There is no reasonable and justifiable reason to limit the plaintiff's right. This Court cannot, in the circumstances, interfere with the plaintiff's autonomy and freedom to litigate against the plaintiff, and prescribe the process a party should follow. There is no basis in law for this Court to find that the plaintiff should have first brought an application to set aside the agreement before instituting the action against the defendant.
- [24] Furthermore, no evidence was presented to persuade me that it is in the best interests of the minor that the plaintiff launch an application to set aside the agreement reached and that the plaintiff's action be dismissed, alternatively stayed.
- [25] There is accordingly no merit in the defendant's special plea that the plaintiff's action was premature.

G. ORDER

[26] In the circumstances, I make the following order:

- a) The special plea is dismissed with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 03 SEPTEMBER 2014

DATE OF JUDGMENT

: 11 SEPTEMBER 2014

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COUNSEL FOR DEFENDANT

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Prepared on 12 October 2026 · Esheria