

SOUTH AFRICA / JUDGMENT

N.F v Santam Limited (11554/2017)

[2024] ZAWCHC 12 (26 January 2024)

[2024] ZAWCHC 12

COURT

Western Cape High Court, Cape Town

BEFORE

Mantame

CASE / FILE NUMBER

11554/2017

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

REPORTABLE

Case

No: 11554/2017

In

the matter between:

N[...]

F[...]

Plaintiff

vs

SANTAM

LIMITED

Defendant

Heard

on: 15 November 2023

Delivered

on: 26 January 2024

JUDGMENT

MANTAME J

Introduction

- [1] This application for condonation pertains to the late filing of the plaintiff's replication to the defendant's plea in the main action. The plaintiff in the main action claims damages on behalf of her minor child, E[...] F[...] ("E[...]") who allegedly suffered an injury at birth resulting in brain damage, severe asphyxia and cerebral palsy.
- [2] The defendant opposed this application on the basis that the replication has been introduced woefully late and it is not "to be taken" that the issues raised in the replication are triable in the sense required in order to permit the amendment of the pleadings by the introduction of the proposed replication.

Facts

- [3] The facts summarised briefly are that E[...] was born on 3 January 2011 at St Mary's Mission Hospital in Pinetown. E[...] is currently thirteen (13) years old. At the time of E[...]’s birth, the minor child allegedly sustained an injury which resulted in damage, severe asphyxia and cerebral palsy. The defendant, Santam Limited at the time was the insurer of St Mary's Mission Hospital.
- [4] St Mary's Hospital at all times was owned and operated by The St Mary's Catholic Mission Hospital Trust ("the Trust"). The plaintiff instituted action against the Trust in April 2013 and against the defendant in June 2017. The Trust
- later became insolvent and was placed on final liquidation on 13 May 2016.
- [5] The action instituted against the defendant by the plaintiff is that the injury suffered by E[...] at birth was as a result of negligence of the medical officers at St Mary's Mission Hospital, and such negligence was not solely limited to negligence arising from "midwifery duties" as the defendant has repeatedly said. Upon the Trust fulfilling its obligations, the defendant was bound to insure the Trust in accordance with Exclusion, Conditions and Limitations contained in the contract annexed as "Annexure A" to the Plea and entitled: Professional Indemnity, Medical Malpractice And Public Liability Insurance For Hospital And Clinics.
- [6] On 28 January 2015, the plaintiff was invited by Norton Rose Fulbright to discuss the Trust's financial situation which appeared precarious at the time with Mr Andre Liebenberg ("Mr Liebenberg"). At the time, it was alleged that both the Trust and the defendant were aware that the plaintiff disputed that the claim arose solely out of "midwifery duties."

- [7] On 4 November 2015, Mr Liebenberg addressed a letter to the Trustees of the Trust and set out various claims against the Trust, including R10 500 000.00 in respect of the plaintiff's claim. Mr Liebenberg stated that St Mary's Mission Hospital does not have insurance for any of these amounts. The only claim in which funds are held is in respect of plaintiff's claim where it was recorded that the defendant had paid R500 000.00.
- [8] In turn, on 16 November 2017, Garlicke & Bousfield addressed a letter which confirmed that the Trust received an amount of R5 560 175.01 in settlement of its insurance obligations and not in settlement of the plaintiff's claim. According to the plaintiff, this appears to be in contrast to the wording of the Agreement of Loss concluded by the Trust and the defendant which specifically referenced the amount of R5 560 175.01

in full and final settlement of the insured's claim for an indemnity under its insurance policy in respect of the action.

- [9] The plaintiff alleges that despite the acknowledgment that the monies paid over to Garlicke & Bousfield were in respect of the plaintiff's claim, however Garlicke & Bousfield paid over to the Estate account an amount of R4 928 587.71. The plaintiff observed that this amount was not ring-fenced, nor used to settle the plaintiff's claim against the Trust. It appears to have been dispersed for general expenses of the liquidated hospital.

Replication

- [10] In its replication, first, the plaintiff asserts that the nature of the negligence and specifically whether it would fall within the ambit of the limitation pertaining to "midwifery duties" on the general malpractice clause has at all times been integral to the plaintiff's claim against the defendant, and the plaintiff has at no point accepted that the negligence arose solely from "midwifery duties." For instance, if the plaintiff is only able to establish negligence arising from "midwifery duties", the limitation of R5 000 000.00 (R5 million) would be applicable. However, if the plaintiff establishes negligence from any medical officer or institutional negligence, the plaintiff's claim against the defendant would be for the medical malpractice with a R25 000 000.00 (R25 million) limit.
- [11] It is the plaintiff's stance that the negligence was not limited solely to "midwifery duties" but medical practitioners. For instance, the plaintiff alleged that the obstetric medical officer on duty on the night of 2 January 2011 and 3 January 2011 mismanaged his or her on duty responsibilities. Essentially, the institutional failure on behalf of the hospital led to the unfortunate events and which ultimately caused E[...]s injury. The defendant cannot elect to pigeonhole the plaintiff's claim into the specific limitation for midwifery, as opposed to general damages.

- [12] The second issue raised in the replication pertains to the amount paid by the insurance not being ring-fenced. The amount paid to Garlicke and Bousfield was in respect of the plaintiff's claim and should not have fallen into the Trust's estate whether liquidated or not. Despite Mr Liebenberg's acknowledgment that the funds were held "in respect of F[...]" and advised that F[...]'s claim was reduced from R10 500 000.00 to R5 500 000.00, there was no provision made by the defendant for the ring-fencing of the funds concerned.
- [13] The third issue raised in the replication pertains to the agreement being concluded to thwart the provision of section 156 of the Insolvency Act 24 of 1936 ("Insolvency Act"). At the time when the Agreement of Loss was entered into, the defendant and the Trust were aware that the Trust was carrying on business in insolvent circumstances and that liquidation in the near future was inevitable, without the assistance from the Department of Health. In the circumstances, upon the liquidation of the Trust, the plaintiff's claim would be against the insurance company directly in terms of Section 156 of the Insolvency Act.
- [1] Madinda v Minister of Safety and Security, Republic of South Africa (153/07) [2008] ZASCA 34 (28 March 2008) para [10]
- [2] Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander 2002 (2) SA 447 (SCA)
- [3] Mynhardt v Mynhardt 1986 (1) SA 456 (T) at 463 E - F
- [4] Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and others (459/22) [2023] ZASCA 112 (26 July 2023)
- [5] In re Lawyers for Human Rights v Minister of Home Affairs and Others (CCT 38/16) [2023] ZACC 34; 2024 (1) BCLR 70 (CC) (30 October 2023)
- [6] General Council of the Bar of South Africa v Jiba [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at para 1.
- [7] Kekana v Society of Advocates of SA [1998] ZASCA 54; 1998 (4) SA 649 (SCA). See also: Chueu above at footnote 4.
- [8] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)
- [9] The Constitution of the Republic of South Africa, Act 108 of 1996

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