

SOUTH AFRICA / JUDGMENT

Van Tonder v Road Accident Fund (1736/2020; 9773/2021) [2023] ZAWCHC 305 (1 December 2023) [2023] ZAWCHC 305

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

1736/2020; 9773/2021

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IN

**THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)****In****the consolidated matters
between:**

Case
No: 1736/2020
DANIE
VAN TONDER
Plaintiff
and
THE
ROAD ACCIDENT FUND
Defendant
AND
Case
No: 9773/2021
DEWALD
RUAN LE ROUX
Plaintiff
and
THE
ROAD ACCIDENT FUND
Defendant

Coram:

Justice J Cloete

Heard: 9 November 2023
Delivered
electronically: 1 December 2023

JUDGMENT

CLOETE J:

Introduction

- [1] These two matters were consolidated and heard together since both solely relate to the liability of the defendant (“RAF”) for payment of each plaintiff’s past medical and hospital expenses. In the case of Mr Van Tonder the proven amount of his claim is R118 670.60 (through the unchallenged testimony of Ms Thea Hoosain, a team leader in the Third Party Recoveries Department of Discovery Health). In the case of Mr Le Roux the undisputed amount of his claim is R59 225.76 less a 10% apportionment which is the basis upon which liability was settled. Both Mr Van Tonder and Mr Le Roux are members of private medical aid schemes (Mr Van Tonder is a member of Discovery Health). The claims of the relevant service providers have already been paid by the scheme(s).
- [2] The RAF however disputes its liability to pay based on two legal arguments which I deal with later. Given that these were raised for the first time at the hearing it is necessary to set out the attitude adopted by the RAF in the recent past pertaining to its liability for payment of such expenses, since it sets the stage for the stance now adopted.

The RAF’s attitude since 2022

- [3] On 12 August 2022 the RAF issued an “Internal Communiqué”

distributed by its Acting Chief Claims Officer to all regional managers. It read as follows:

‘Dear colleagues

All Regional Managers must ensure that their teams implement the attached process to assess claims for past medical expenses. All RAF offices are required to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses. The regions must use the prepared template rejection letter (see attached) to communicate the rejection. The reason to be provided for the repudiation will be that the claimant has sustained no loss or incurred any expenses relating to the past medical expenses claimed. Therefore, there is no duty on the RAF to reimburse the claimant. Also attached is a list of Medical Schemes. Required outcome: immediate implementation of the process and 100% compliance to the process.’

- [4] Discovery Health was one of the medical schemes on the list. It launched an urgent application in the North Gauteng High Court, Pretoria under case number 016179/2022 for inter alia an order reviewing and setting aside that communiqué (“directive”), contending

that it was unlawful and inconsistent with s 17 of the Road Accident Fund (RAF) Act^[1] which imposes an obligation on the RAF to pay a claimant's proven damages, including past medical expenses. On 27 October 2022 Mbongwe J handed down judgment in which he found in favour of Discovery Health. The learned Judge succinctly summarised the legal position as follows:

[20] Compensation for delictual damages a claimant is entitled to comprise of the difference between his/her patrimonial station before and after the delict has been committed. In *Erasmus Ferreira & Ackermann v Francis* 2010 (2) SA 228 (SCA) para 16 the court expressed the nature of an injured person's claim thus:

"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."

[21] In terms of our law, benefits received by a claimant from the benevolence of a third party or a private insurance policy are not considered for purposes of determining the quantum of a claimant's damages against the first respondent. The reason for this is merely because a benefit that accrues or is received from a private insurance policy origin from a contract between the insured

and the insurance company for the explicit benefit of the claimant and its receipt does not exonerate the first respondent from the liability to discharge its obligation in terms of the RAF Act. In *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C) at 277H – 279C ... set out the principle in the following words:

"The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed... Similarly, and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the object in awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action."

Notwithstanding the foregoing, it is well established in our law that certain benefits which a plaintiff may receive are to be left out of the account as being completely collateral. The classic examples are (a) benefits received by the plaintiff under ordinary contract of insurance for which he has paid the premiums and (b) money and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law baulks at allowing the

wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff."

[22] In *Ntlhabyane v Black Panther Trucking (Pty) Limited and Another* 2010 JDR 1011 (GSJ) the court expressed the principle in the following terms:

"a plaintiff's insurance, her indemnification in terms of it, and the consequent subrogation of her insurer are all matters of no concern to the third party defendant."

[23] The liability of the RAF is excluded or limited in certain instances:

23.1 The provisions of section 18 expressly exclude benefits received under COIDA or the Defence Act from the calculation of the claimant's damages in terms of the RAF Act. This is in circumstances where the victim of a motor vehicle accident is also entitled to compensation under the Compensation for Occupational Injuries and Diseases Act 103 of 1993 ("COIDA"), or the Defence Act 42 of 2002 ("Defence Act").

[24] Section 18(4) limits the liability of the RAF to payment for the necessary and actual costs of the burial or cremation of a deceased victim of a motor vehicle accident. Section 19(g) excludes claims for emotional shock caused by the witnessing or being informed of the death of a motor vehicle accident.

[25] The Act precludes a claim for payment of interest *a tempore morae* against the first respondent.

[26] Certain benefits are considered while others are not considered in the calculation of the claimant's claim for damages against the first respondent. It is trite that social security benefits a claimant receives from the State are deductible from compensation the first respondent is liable for. The reason for this is founded on the principle that delictual damages are meant to restore the claimant to the position he was in prior to the commission of the delict and that he should not unduly benefit by receiving double compensation for his/her loss. (see *Zysset and others v Santam Ltd* above)

[27] As can be noted from the above exclusions and limitations, the RAF Act does not provide for the exclusion of benefits the victim

of a motor vehicle accident has received from a private medical scheme for past medical expenses. The principle was expressed by the court in the matter of *D'Ambrosini v Bane* 2006 (5) SA 121 (C) in the following words:

"medical aid scheme benefits which the plaintiff has received, or will receive are not deductible from in determining his claim for past and future hospital and medical expenses."

[28] In *Rayi NO v Road Accident Fund* (9343/2000) [2010] ZAWCHC 30 (22 February 2010) the court stated the principle thus:

“payment by Bonitas of the plaintiff’s past medical expenses does not relieve the defendant of its obligation to compensate the plaintiff for past medical expenses.”

[29] It is apparent from the above statements of the legal position that the first respondent is not entitled to seek to free itself of

the obligation to pay full compensation to victims of motor vehicle accidents. Thus the directive challenged in the present proceedings

is outside the authority given by the enabling statute. More specifically the directive is inconsistent with the express provisions of section 17 and is, consequently, unlawful.

[30] The social security protection the RAF Act provides is in no way intended to impoverish medical schemes who, were the directive to

stand, would face a one direction downward business trajectory as a result of their members becoming victims of motor vehicle accidents. The levy paid on fuel provides the funds for payment of compensation to motor vehicle accident victims and nothing in the law obliges medical aid schemes to contribute towards such compensation by the payment, from the time of hospitalisation and treatment of a motor vehicle accident victim, of medical expenses without a reasonable expectation of reimbursement upon settlement of the claimants’ claims in terms of the RAF Act.

[31] It is for that expectation that medical schemes enter into agreements with their members and provide relevant invoices of medical expenses incurred to be considered in the calculation of the claimants’ claims. Settlements of victims’ claim is in full and final settlement. This means that, unless the past medical expenses form part or are included in the settlement amount, medical aid schemes will not be reimbursed for the medical expenses they paid. Worst still, medical schemes would have no standing to recover those expenses due to the claimant’s claims having been settled in full and final settlement.

[32] The only way to prevent their loss of expenses incurred for the medical treatment of their client victims of motor vehicle accidents, would be for the medical schemes to institutes concurrent claims against the RAF and in due course seek the consolidation of the hearing of the two matters. The costs of the proceedings will be astronomical and unnecessarily incurred by the RAF which, in terms of the Public Finance Management Act, will constitute wasteful expenditure.

[33] The applicant has attached as annexure FA 9 a copy of a press release by the Council for Medical Schemes (“the CMS”) dated 12 March 2012. In addition to advising members of medical schemes of their rights to claim from the RAF in the event of sustaining injuries in a motor vehicle accident caused by the negligence of the driver. The applicant refers to rule 14.5 of the Model Rules of the CMS which states, in relation to past medical expenses paid by the scheme, that:

“If a member becomes eligible for a third party claim, the member undertakes to submit same and refund the medical aid scheme,”

- [34] The applicant has made its own rule 15.6 (Annexure F10) in line with the Module Rule 14.5 of the CMS in terms of which members of the applicant who have claims for damages may claim against third party indemnifiers such as the RAF, and are required to reimburse the medical scheme for payments made in respect of their past medical expenses that the scheme has settled.
- [35] The issuing of the directive is an exercise of statutory authority by an organ of State and is consequently reviewable in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000. As indicated above, there can be no doubt that the issuing of the directive by the respondent amounts to an unlawful abrogation of its statutory obligations in terms of the RAF Act – the enabling statutory instrument. Not only is the exercise of the statutory

powers in this manner a flagrant disregard of the provisions of the enabling statute, but a hopeless undermining of provisions of the Constitution which seek lawfulness, justice and fairness in the exercise of administrative powers.

(my emphasis)

- [5] On 23 January 2023 the RAF’s application for leave to appeal Mbongwe J’s judgment was refused. On 23 February 2023 the RAF petitioned the Supreme Court of Appeal and on 31 March 2023 its petition was refused by that court. On 24 April 2023 the RAF applied to the Constitutional Court for leave to appeal and on 18 October 2023 that court refused the application with costs.

The RAF’s new stance

- [6] At the eleventh hour prior to the hearing before me the RAF prepared a detailed schedule of Mr Van Tonder’s past medical expenses which included reasons for the rejection of his claims (this was handed in as Exhibit “C”). After the testimony of Ms Hoosain the only relevant reason for rejection was the following: ‘Declined as per RAF policy due to costs being related to an EMC [emergency medical condition] and is [sic] the sequelae thereof’. This was applied to every single claim of Mr Van Tonder.
- [7] Although the “policy” referred to was not made available by the RAF to either counsel for the plaintiffs or the court (nor it would seem even to the hapless legal representatives of the RAF themselves) as far as can be gleaned this “policy” is a new instruction issued by the RAF’s Ms Pheladi Moagi, who is its Senior Manager: Corporate Legal Services. It is to the effect that the RAF has now decided to reject any claim for past medical expenses on the basis that such a claim is apparently excluded by virtue of s 19(d)(i) of the RAF Act and/or regulations 7 and 8 of the Medical Schemes Act.[2]
- [8] Section 19 reads in relevant part as follows:

‘19. Liability excluded in certain cases. —The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage—...

- (c) if the claim concerned has not been instituted and prosecuted by the third party, or on behalf of the third party by—
 - (i) any person entitled to practise as an attorney within the Republic; or
 - (ii) any person who is in the service, or who is a representative of the state or government or a provincial, territorial or local authority; or
- (d) where the third party has entered into an agreement with any person other than the one referred to in paragraph (c) (i) or (ii) in accordance with which the third party has undertaken to pay such person after settlement of the claim—
 - (i) a portion of the compensation in respect of the claim;...’

[9] Regulation 7 of the Medical Schemes Act defines ‘prescribed minimum benefits’ as including ‘any emergency medical condition’. Regulation 8(1), in referring to ‘prescribed minimum benefits’ provides ‘[s]ubject to the provisions of this regulation, any benefit option that is offered by a medical scheme must pay in full, without co-payment or the use of deductibles, the diagnosis, treatment and care costs of the prescribed minimum benefit conditions’.

[10] The RAF’s argument in relation to s 19(d)(i) is that because the plaintiffs, as members of their medical aid schemes, agreed to reimburse such scheme any amounts paid over by the scheme to service providers, this amounts to an agreement falling within the exclusionary provision of that subsection. In *Road Accident Fund v Abdool-Carrim and Others*[3] at issue was the proper interpretation of s 17(5) read with s 19(d) of the RAF Act. The court summarised the crux of the appeal before it as follows:

‘[3] Where a third party is entitled to compensation and has incurred costs in respect of medical services which are recoverable from the Fund, s 17(5) permits “suppliers” who have rendered such services the right to claim their costs directly from the Fund without having to claim from the third party. It also provides, and this is the contentious part, that “such claim shall be subject, mutatis mutandis, to the provisions applicable to the claim of the third party concerned...”. Section 19(d) renders a third party claim unenforceable against the Fund if he or she has entered into an agreement with someone other than an attorney or someone who falls within a class of persons referred to in s 19(c)(ii) in accordance with which he or she has undertaken to pay the person for their services after settlement of the claim. The narrow question in this appeal is whether the phrase “subject, mutatis mutandis, to” in s 17(5) renders s 19(d) applicable not only to third party claims but also to those of suppliers in the sense that should a supplier enter into such an agreement the supplier’s claim against the Fund becomes unenforceable...’

[11] The court found as follows:

[11] The phrase “subject, mutatis mutandis, to” means literally “subject, with the necessary changes, to”. Any alterations must in their context be “necessary”. By making the supplier’s claim “subject, mutatis mutandis, to” the provisions applicable to that of the third party, the legislature, in my view, intended to make the supplier’s right to claim from the Fund conditional upon the validity and enforceability of the third party’s claim and not to render the supplier’s claim unenforceable against the Fund by reason of an agreement with a person other than an attorney to pay such person, after settlement of the claim, a portion of the compensation in respect of the claim.

[12] Support for the above interpretation is to be found in the main purpose of the Act referred to earlier and also to the accessory nature of the supplier’s claim. In my view, the Fund’s interpretation of the effect of s 17(5) is incorrect. It is not necessary to substitute “supplier” for “third party” in s 19(d) to give efficacy to the subsection. On the contrary the substitution places it at odds with the Act’s purpose, and from the Fund’s perspective, achieves nothing. For if a third party’s claim is valid and enforceable and the supplier’s is not, the Fund would still be liable to compensate the third party who in turn remains contractually liable to the supplier. The consequence is that a third party may be faced with a claim with a supplier without having been paid and would be denied the benefit of s 17(5) without any fault on his or her part. This result could hardly have been what the draftsman intended. Moreover it is illogical for the third party claim to be valid and enforceable but the supplier’s accessory claim not (except where the supplier has not complied with the prescribed formalities).

[13] It is understandable that the legislature would seek to protect third parties, many of whom are indigent, from entering into champertous agreements, which is probably what s 19(d) intends to achieve. But there is no apparent reason to restrict the contractual freedom of suppliers, many of whom are professional people, institutions or companies from contracting with whoever they choose to process their claims. They should be capable of looking after themselves.’

(my emphasis)

[12] By parity of reasoning this puts paid to the RAF’s s 19(d)(i) argument. The RAF’s other contention, placing reliance on the regulations quoted above, is that because a medical aid scheme is bound to pay certain minimum benefits without any deduction (one of which is treatment for an emergency medical condition) this precludes

the scheme from relying on the doctrine of subrogation; and accordingly since the scheme cannot claim repayment from its member

by virtue of subrogation that member, if he or she is a third party claimant against the RAF, cannot claim against the RAF for past medical expenses.

[13] In Rayi NO v Road Accident Fund[4] the court dealt with the question whether the RAF was liable to compensate the plaintiff for past hospital and medical expenses in light of the fact they had already been paid by Bonitas medical aid scheme. Zondi J (as he then was) found as follows:

‘[12] It is clear to me that a procedural remedy which is available to the supplier of goods or services in terms of section 17(5) of the [RAF] Act is not available to Bonitas. It paid past medical expenses on behalf of the plaintiff. It did not supply goods or provide services on behalf of the plaintiff. Bonitas can therefore not claim directly from the defendant the expenses it incurred on behalf of the

plaintiff in terms of section 17(5) of the Act.

[13] Bonitas can recover from the defendant the payment it made on behalf of the plaintiff and for which the defendant is primarily responsible by way of an action based on the principle of subrogation. It may sue the defendant in its own name or in the name of the plaintiff. (Rand Mutual Assurance Co Ltd v Road Accident Fund [2008] ZASCA 114; 2008 (6) SA 511 (SCA) at para 24). Subrogation embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance...

[15] In my view, settlement by Bonitas of the plaintiff’s past medical expenses does not relieve the defendant of its obligation to compensate the plaintiff for the past medical expenses he incurred. Payment by Bonitas was made in terms of the undertaking made by the plaintiff to Bonitas in terms of which Bonitas agreed to settle the plaintiff’s past medical expenses on the understanding that upon a successful recovery from the defendant, the plaintiff would reimburse Bonitas for all the costs it incurred on plaintiff’s behalf in connection with the claim against the defendant.

[16] The obligation which the undertaking imposes on the plaintiff towards Bonitas does not arise until such time that there is a successful

recovery of the past medical expenses by the plaintiff from the defendant. The defendant primarily remains liable to the plaintiff

for the payment of the past medical expenses and the liability of Bonitas to the plaintiff for the past medical expenses is secondary

to that of the defendant. The defendant should pay the past medical expenses to the plaintiff who should upon receipt of payment account to Bonitas in terms of the undertaking.’

(my emphasis – see also Ackerman v Loubser;[5] Mooideen v Road Accident Fund;

[6] D’Ambrosi v Bane and Others;[7] Watkins v Road Accident Fund.[8])

[14] There is no dispute that both Mr Van Tonder and Mr Le Roux have contracted with their medical aid scheme(s) to reimburse the scheme any amounts paid by the RAF for past medical expenses. The RAF was unable to refer me to a single authority to the effect that,

despite the long line of decisions to the contrary on the doctrine of subrogation, regulations 7 and 8 of the Medical Schemes Act somehow nevertheless override the well established legal position. I agree with counsel for the plaintiffs that the RAF's argument on this score is contrived and appears to be an attempt to avoid the consequences of the Constitutional Court's refusal of leave to appeal in the Discovery Health matter referred to above.

[15] I was informed during argument that since the dismissal of that application for leave to appeal by the Constitutional Court the RAF has nonetheless persisted in refusing to pay claimants their past medical expenses. The conduct of the RAF in the litigation before me, at least since 18 October 2023 when the Constitutional Court

gave its order, must be deprecated. It is clutching at straws and in the process depriving deserving claimants of their lawful

entitlement. In the process it is shamefully wasting yet more public funds which should be directed at settlement of worthy claims. In this regard I must however make clear that this conduct by the RAF cannot be attributed to its legal representatives who were instructed to appear at the hearing. Upon questioning by the court it became clear that these arguments were to be advanced on the specific instruction of Ms Moagi of the RAF. In the circumstances I am persuaded that the punitive costs award sought on behalf of the plaintiffs, at least since 18 October 2023, is warranted.

[16] The following order is made:

1. In case number 1736/2020:

1.1 The defendant shall pay the plaintiff the sum of R118 670.60 for his past medical expenses, together with interest thereon at the prescribed legal rate of interest calculated from 14 days after date of this order to date of final payment; and

1.2 The defendant shall pay the plaintiff's costs up to and including 18 October 2023 on the scale as between party and party,

and thereafter on the scale as between attorney and client, and including the costs of counsel.

2. In case number 9773/2021:

2.1 The defendant shall pay the plaintiff the sum of R59 225.76 less a 10% apportionment for his past medical expenses, together with interest thereon at the prescribed legal rate of interest calculated from 14 days after date of this order to date of final payment; and

2.2 The defendant shall pay the plaintiff's costs up to and including 18 October 2023 on the scale as between party and party,

and thereafter on the scale as between attorney and client, and including the costs of counsel.

J I CLOETE

For plaintiffs: Adv W Coughlan Instructed by: Sohn and Wood (Ms M Wood) For defendant: State Attorney (Mr C Hindley) and Ms S Masoet-Maduray

[1] No 56 of 1996.

[2] No. 131 of 1998.

[3]

[2008] ZASCA 18; 2008 (3) SA 579 (SCA).

[4]

[2010] ZAWCHC 30 (22 February 2010).

[5] 1918 OPD 31 at 36.

[6] Unreported judgment of Davis J in this Division under case number 17737/2015, delivered on 11 December 2020.

[7] 2010 (2) SA 539 (SCA).

[8] Unreported reasons for Order by Van Zyl AJ in this Division under case number 19574/2017, delivered on 8 February 2023.

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